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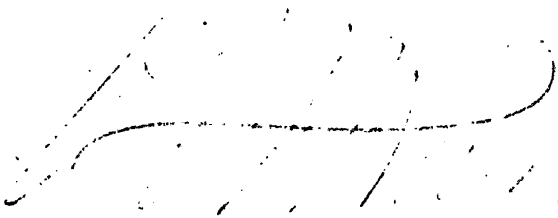


# THE TRIAL OF THE CONSTITUTION.

THE

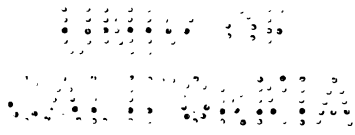
# TRIAL OF THE CONSTITUTION.

BY

SIDNEY GEORGE FISHER,

AUTHOR OF

"THE LAW OF THE TERRITORIES," "THE LAWS OF RACE AS CONNECTED WITH SLAVERY," ETC. ETC.



"Stand ye in the ways, and see and ask for the old paths, where is the good way, and walk therein, and ye shall find rest for your souls." JER. 6:16.

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TO WHIG
AMERICA

# PREFACE.

As passing events are referred to in the following pages, it is proper to state that the third, fourth and fifth chapters, except a few additions and alterations, were written before the first and second. My original design was to write an essay on the constitutional provision for suspending the Writ of Habeas Corpus; and it was suggested by Mr. Binney's first pamphlet on that subject,—the reasoning of which, notwithstanding my deference to such high authority, did not satisfy my mind. Some weeks before the appearance of Mr. Binney's second pamphlet, my argument on the Habeas Corpus was finished; but the writing of it, and the events of the war, had suggested reflections on other parts of the Constitution. I was much impressed by the fact, that Mr. Binney and others had thought it necessary to write on the subject at all; that the law should be unsettled and disputed on questions of such vital importance as the power of the Government to defend the public safety, and the security afforded, by the Constitution, to personal liberty.

Why is the law unsettled? Why can no man tell what are the actual, undoubted powers of the Government? Is it not because our system is new and untried; and that now, when it is for the first time subjected to the test of a severe

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ordeal, its defects are becoming manifest,—defects hitherto unsuspected? No such questions have arisen under the English Constitution for nearly two centuries.

Following the course of reasoning thus suggested, one topic opened the way to another, until at length I ended where the work more appropriately begins,—with a discussion of the nature of the Constitution itself, and of the powers which it does or must grant to the Government, over itself, and over the Union.

Books, laws, facts, even words and phrases, sometimes assume a new aspect, when seen through the medium of feelings produced by important events and a novel situation. Like many others, I had been content to sit at the feet of the learned doctors of our law, and accept their interpretation as correct. But the war has shed new light on the principles and meaning of our Constitution, and revealed in it imperfections, perhaps also powers, scarcely perceived by its makers, and hidden from the superficial and unsuspecting glances of the people, during our long period of prosperity and peace.

I yielded with reluctance to the reasoning, by which some of the opinions asserted in this book are, in my judgment, sustained. If that reasoning can be refuted, no one will be more gratified than myself. I offer my views to the public with unfeigned diffidence. I consider it a duty to offer them, because, if true, they are important; and I believe them to be true. I do not advocate, I state them. Reason looks for truth only, not expediency; well knowing that what is false cannot be expedient; well knowing, too, that a Government founded on falsehood, cannot endure. What is false in our

Constitution, or in the interpretation of it, should be got rid of; for thus only can it be preserved.

The flight of events is now so rapid, that he who wishes to influence opinion must speak quickly, and cannot therefore bestow much time on careful and artistic execution. This work was begun in February last, and completed in October,—a period long enough for one of larger size, had not the writing of it been frequently interrupted. Besides its other faults, it has some, therefore, attributable to haste,—redundancies, repetitions, perhaps some mistakes in facts and references. For these I crave the indulgence of my readers, should I be lucky enough to have any. If the book contains any substance of truth, inelegance of form may be forgiven.

NOVEMBER 22, 1862.

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# THE TRIAL OF THE CONSTITUTION.

## CHAPTER I.

### A WRITTEN CONSTITUTION.

GOVERNMENT is a machine for applying principles and imposing rules of conduct essential to the well-being of a people. The machine is very simple or very complex, according to the needs and capacity of the people; and it varies with these, through all forms, from the chieftainship of a savage tribe up to the highly artificial structure of an English or American constitution. It varies, also, to supply wants created by the progress which a nation makes, upwards or downwards, to higher or lower planes of civilization, and is always "becoming" something that it was not; its "real being," to use Plato's language, consisting of the idea or truth it is intended to manifest and execute.

But the machine called Government, or improvements in it, are not easily invented, and when invented are difficult to get accepted by the people or put in operation. Forms, therefore, should not be rashly altered; and the only safe foundation for government is custom—another name for experience—the best guide in temporal affairs. No man or assembly of men is wise as the generations or as time, for time reveals imperfections, and the thought of those who feel them is set to work to remedy them as they arise. Therefore Lord Coke says, "If the reason that is dispersed into so many several heads were

united into one, yet could he not make such a law as the law of England is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such perfection, for the government of this realm, as the old rule may be justly verified of it; *nemini enim oportet esse sapientorum legibus;* no man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason."

The meaning of this is, not that the law has attained or can attain ideal perfection, but that the reason of the people is always employed in perfecting it to suit the demands which are made by time, so that the law grows with the mental growth of the nation, and fits its shape and stature always,—thus imitating, in its changes, time itself, which, as Lord Bacon says, "innovateth greatly, but quietly and by degrees, scarcely to be perceived."

Indeed, it is philosophically true that all law, in the long run, is and can be nothing but custom. A statute is a declaration of an old right or a new want. If it supplies the one or guarantees the other, it survives, and, with its constructions and the practice that grows up under it, becomes custom or common law. If it serves neither of these ends, it is repealed or amended, or becomes obsolete, or is bent or twisted by the courts and the people to suit the needs of the hour, until, by judicial legislation and the action of public opinion, it is made to mean something which perhaps those who wrote it never intended. So it is with political or constitutional law. It is either immemorial custom, as in England, or a written constitution in the nature of a statute, altering custom to suit a change of circumstances, or to provide security for violated or newly-acquired rights.

A revolution is usually the occasion which gives birth to alterations in constitutional law, or to renewed guarantees for endangered rights. Should the new constitution prove adequate to the wants and satisfy the wishes of the people, it is cherished as their chief blessing and richest inheritance. Succeeding generations are taught to regard it with love and reverence, and it becomes, after a time, custom or common law,

which grows and flourishes in the genial soil of popular affection, grasping the earth with its roots, and spreading above its sheltering canopy. Such were the three organic acts of the British Government: Magna Charta in 1215, the Petition of Right in 1645, and the Bill of Rights in 1688,—neither of them the invention of any man or set of men, neither of them professing to create new rights, but each proclaiming itself a fresh and solemn declaration of ancient law and custom.

These, therefore, have flourished through the centuries, and are yet green and growing. The Constitutions that were the offspring of the French Revolution,—the creations of ingenious men undertaking to provide for the future whilst disregarding the past,—perished with the hour that produced them. Their authors thought themselves wiser than the law, wiser than time. Their elaborate machines, with their cunningly-contrived checks, balances, wheels, and springs, would not work. Events, and the genius of the French people, have made a different sort of Constitution for France.

So entirely is a constitution the outgrowth of the character of a nation, as influenced by circumstances, that no man or set of men, convened for the purpose, can provide fully for the wants of the future. These must be met and satisfied by the men of the future; and they will either abolish a plan of government that does not suit them, or alter it until it does: for a government is for the people,—not the people for a government,—which must be, not a fetter, but a dress,—giving protection, but permitting easy and free motion. The less there is in it that is new, the more likely it is to be permanent. But its character can hardly be considered established until it has been tried by prosperity and by adversity, for it was intended for both. When it has stood the strain of poverty and wealth, of obedience and treason, of peace and war, foreign and domestic, and under it the nation has grown constantly in power and civilization, such a government, like a mountain hoary with age, yet covered anew with young life,—like a river ever full and ever flowing towards the ocean of the future, and ever bountiful of benefits,—ceases to be regarded as the work of man. Nature adopts it gladly into her race, and gives it rank

with Andes and Ararat, with the Nile and the Mississippi. Such was the Constitution of the great Indian Empire which flourished for thousands of years before our antiquity began; such that of Rome, the fountain of modern European law; and such is the Constitution of England.

It is an unwritten Constitution, by which is meant the custom of the nation in organic law, to be gathered from acts of Parliament, the practice of the Government, historical precedents, and the decisions of the courts. A written constitution is one constructed by one man or an assembly convened for the purpose, granting and distributing political power, and providing security for personal rights. It has two inherent defects,—it cannot adequately provide for the future, and its meaning is necessarily uncertain. No man or convention, or single generation, can furnish wisdom and knowledge to foresee all exigencies that may arise, and supply the needed powers to meet them, and it is impossible to use language, so clear and explicit, as to exclude doubt as to the meaning, often, of the most important clauses. Every English statute cost thousands of pounds in litigation before its construction was settled, and an eminent counsel once said, that he could drive a coach and six through any that could be written. But there is no doubt about a custom, an immemorial usage, which time and habit have impressed upon all minds.

Whilst, therefore, every statute gives rise to disputes about its meaning, the difficulty in administering the common law, is not in the law but in its application to facts. For this reason the idea of codifying the law has been generally abandoned, as likely to cause more uncertainty than it can prevent, and reliance on precedent is preferred, however cumbrous its mass must become in time. After a certain period, leading cases are eliminated, which embody principles, and the undergrowth perishes, for time destroys what it does not need; as a forest is thinned by the nature of the soil. A code must still be construed, and each construction becomes a precedent. A new crop of precedents is thus produced, not out of the past, but out of the brain of the codifier, and what that crop will be,

no one can tell; as when a wood is cut down, no one can tell what sort of trees will grow in its stead.

The Constitution of this country is yet young. It is young in time, for it is less than a century old; it is young in experience, because it has not gone through the testing trials of great dangers. It was unavoidably a written Constitution. It was the creature of events that made it necessary to combine new things with the old, and to provide for a future that must be different from the past. The condition of the people was changed suddenly, and for that reason so was their government. The stream of precedent was rudely stopped, and for the gently moulding touch of time was substituted the constructive hand of experiment. Not rashly or hastily was the work done, but prudently and anxiously, by men who brought to its performance great abilities, much learning, long experience, and, above all, a pure and lofty purpose. But they were men, and no match for the centuries. They were an assembly called from the fleeting present, and not so wise as the generations of the past. Shall we wonder, should it happen, that they were not so wise as the generations of the future? They gave at least one proof of wisdom by showing their reverence for the past. Unlike the constitution-mongers of the French Revolution, what they could retain of its inherited treasures they did.

Those treasures were such principles of the English Constitution as were consistent with the circumstances of the American people. The law is the birthright of an Englishman, and wherever he plants a colony, he carries it with him, so far as it is applicable to the colonial state. The colony is deemed a part of the ancient dominions, and the subjects inhabiting them retain their former rights and privileges.* The first attention of the colonists of New England was directed to the establishment of "the free liberties of freeborn Englishmen," and they proceeded to declare their rights and funda-

* 1 Story on the Constitution, § 103–110.

mental laws, almost in the language of Magna Charta.* Their example was generally followed by the other colonies, so that up to the time of the Revolution, the laws and customs of England prevailed among them not only because they were subjects of the British Government, but by the free choice and acts of the people. Under these laws they lived until the formation of our Constitution; for the government of the Confederation and the attempts at a Union which preceded it, did not affect the rights of the people, as they did not act on individuals, but on States, and by means of their authority. It was found that union was indispensable to safety, and that a compact or league of sovereign communities was not a union, neither was it a Government, because it was deficient in power to enforce its own laws, and a Government that could make itself obeyed and respected was as necessary as union.

The difficult task, therefore, imposed by the Revolution was to transfer to a new Government of the Union, the control over persons and things, for national purposes, which had been exercised severally by the Colonial Governments, without encroaching upon the proper independence of the Colonies, or States, as they became under the Constitution, and at the same time, to preserve to the people all the civil rights and liberties they had enjoyed as British subjects.

The first object was obtained by clothing the new Government with power to execute its laws by its own courts and officers, and these laws, together with the Constitution, were declared to be supreme over the whole country, and over the Government of the States. The second was provided for by limiting the authority of the Federal Government to national and general objects. It was to represent the whole nation, and was, therefore, to act only upon the interests of the whole. To secure the precious inheritance of English freedom and its principles, and the guards by which they had been protected, Magna Charta and the Bill of Rights were copied, and the trial by jury and the habeas corpus made parts of the Constitution. In these objects the chief difficulty was the combi-

* 1 Story on the Constitution, § 59–163.

nation of national sovereignty with the independence of the States, of local and general power, the creation of a harmonious whole, to be at the same time a nation and a confederacy.

The pressing wants of the time could only be supplied by a new Government, and none existed that would supply them. A new Government, contrived by somebody, to satisfy the present need, and also, if possible, to provide for the future; that is to say, a written Constitution had become a necessity. The people were convinced of this, and as they could not possibly make a Government for themselves, they chose a Convention, composed of their wise men, to make one for them, to contrive a machine by which the objects above stated, of National Union and of private liberty, could be practically obtained for themselves and their posterity forever.

The Convention had before them a certain quantity of old material, valuable because it was old and tried, which they could work up. They had the Articles of Confederation, some of which had proved useful; the charters, laws and constitutions of the Colonies, the common law of England and the general principles of the English Constitution in relation to the nature of political power, its distribution among several departments, and the appropriate functions of each. They used all these liberally and discreetly, but still the effective machinery was wanted to endow the principles with life and activity. The Convention had not "King, Lords and Commons," and were obliged to invent something to supply their place. In performing this task, they were led, naturally and necessarily, to adhere, as closely as circumstances would permit, to the English model, because it was a good one, and because they were Englishmen and had recently been English subjects.

But the Convention were obliged to serve two masters, first their own idea of what was best, and secondly the people, who had recently been at war with England, whose passion for liberty was at the time excited beyond its ordinary state, who were to pass upon the Constitution, and would probably reject it if too conservative or too English for their taste. The

invention or creation, moreover, of an entirely new system of Government is a superhuman undertaking, never yet attempted without signal failure, if indeed it ever was attempted, except in Utopias of Philosophic dreams. A government to work well in practice must accord not only with new circumstances but with old ideas and must, therefore, be partly new and partly old, and more of it must be old than new, for the ideas of the past outnumber those of the present. Our ancestors, therefore, followed the English model as closely as they dared, not perhaps as closely as they wished. The Judiciary is entirely English in most of its features. The Legislature is composed of two houses like the English Parliament. The House of Representatives is substantially the same as the House of Commons, and the Senate in its limited number, in its longer term and mode of appointment, has some faint resemblance to the House of Lords. It is the conservative feature of the Government to represent the States as such, and was intended to exercise a restraining influence upon the House, which being elected directly by the people, is more under the influences of popular passion. The hardest problem was, how to manage the Executive power inherent in every Government, and in constructing this, the Convention departed most widely from the English system. Hereditary royalty was not to be thought of, and yet they were obliged to confer royal power. A new machine to contain and apply it must therefore be contrived, and they did contrive one, unique in its character; the success of which is yet doubtful.

In another important particular the work of the Convention is generally thought to differ from the English pattern. They constructed a Government whose powers, it is said, are limited by law. Supreme power, the eminent domain, must of course in every country reside in the people; but in England the whole of it is delegated to the Government, which has no legal fetter on its action, but is theoretically "omnipotent," though the right of revolution or the right of resistance to oppression or injustice or to an attempt to destroy the ancient laws and liberties of the people, impliedly remains with them, of necessity, for it is a natural right. But by our

system the people are supposed to have intrusted the Government with a part only of their power. It is provided that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people;" that is to say, the powers not prohibited to the States are reserved to them, and the powers not conferred on the Government are reserved to the people.

Among the powers thus reserved to the people is that of altering the Constitution in the manner prescribed by itself. In England the Constitution may be altered by Parliament. Here, organic changes in the Government, according to received opinions, can be made only by a convention elected for the purpose, and in an appointed manner, by the people; there, they can be made by an assembly also elected by the people, and for the same purpose, since it has the same power. In both cases the resort is to the people—that is to say, to popular opinion requiring a change. The difference is that in England the whole power of the people is delegated to Parliament, and the power, therefore, is always ready for action, whilst with us it can only be made available by a difficult and uncertain process, slow, though prompt measures may be important, and uncertain in its results, because the consent of three-fourths of the States or of the people, is necessary before an alteration can be made. The English organic law is the custom of the Government. It is in no danger of sudden and great innovations, for it is the nature of custom or habit to change slowly. It is also its nature to be constantly changing, according to the age, circumstances, and mental condition of an individual or a nation. Safe and gradual change may therefore be predicated of the English Constitution, and such in fact has always been its characteristic.

But how can our Constitution be altered when alteration is necessary? It is a code, partly of old and therefore customary law, but partly and largely of new contrivances. The new portions, where doubtful in their meaning, must be construed, and therefore may be moulded by the practice of the Government and by the Courts, and thus to that extent the

Constitution may be altered by the usage of the Government, as it has been. The Government is one of limited, but also of implied powers,* and this affords a certain latitude for needed change. But the exigencies of the future may require great and organic changes; the best opinion of the country may demand them, a majority of the people may demand them, and the necessity for them may be obvious to all men able to think upon the subject, which nevertheless may not be three-fourths of the people or of the States. Where, then, is the remedy? If amendments to the Constitution are really necessary they will be made. But the conditions imposed by the Constitution require, first, that two-thirds of both houses of Congress, or the Legislatures of two-thirds of the States shall propose amendments, which must be ratified by the Legislatures of three-fourths of the States, or by conventions in three-fourths of them.

It will be difficult to satisfy these conditions, yet necessary changes in the organic law must be made. On the other hand rash, ignorant, even fatal alterations, in times of popular excitement, may be proposed and hurried through the constitutional forms, by demagogues controlling the masses for a time, and would thus become a part of the Constitution unalterable, even when found mischievous, except by another doubtful and dangerous appeal to three-fourths of the States. The provision in the Constitution for amending it has been called a safety-valve to prevent the explosion of the passions of the people in revolutionary violence. But the efficacy of a safety-valve depends on the promptness with which it can be opened and the width of its throttle. If defective in either of these, when the pressure of steam is too high the boiler will burst.

The English Constitution has been going through a constant process of change for eight hundred years, dating from the Norman conquest. All the changes have been beneficial, and though some have been accompanied by violence, they have all been made by Parliament. No convention for this purpose

* 1 Kent's Comm., 236; Story on Constitution, § 433.

has ever been elected by the people to exercise their reserved power. Yet feudalism and Romanism have been abolished, Plantagenets, Tudors, and Stuarts controlled, the prerogative of the King diminished, the succession to the Crown altered, the powers of the Legislature enlarged, the tenure of the Judiciary changed, and the whole machinery of the Government modified to secure the rights and liberties of the people and to suit their growth and progress. Through all these stormy centuries this machinery has worked well, because the alterations have been skilfully made, as Lord Coke says, "by an infinite number of *grave and learned men* and by long experience." The process is still going on. "Grave and learned men"—the best minds of the nation—are now pondering the necessity for further change, what that change shall be and how it can be safely and beneficially made. They anxiously consult the indications of popular sentiment, though they summon no conventions of the people. There is no necessity for these, as Parliament is intrusted already with the whole power of the people, and is responsible to them. The action of Parliament is therefore free; members are not delegates to register a foregone conclusion, but meet to deliberate, to compare opinions, to gain light and knowledge. It is almost impossible, therefore, that under the operation of the principle of representation and of a free press, any changes can be made not required both by the wants and the opinions of the people, or that when made they will be resisted.

The Amendment Article in our Constitution has not preserved us from civil war, though the war turned on construction as to the power of Congress over the Territories. The safety-valve did not work, and the boiler has burst. The valve could not be opened, and had it been, would not have let off the steam. The rebellion has tested and illustrated its merits as a means of peacefully altering the Constitution.

The Convention were anxious to protect the Government they had made from the rash spirit of innovation inherent in a democracy. They therefore interposed barriers to restrain it. But it is a spirit that cannot be restrained by any democratic means. A Government powerful enough to resist the

people, is not a democracy. Instead of a dam to back up the rushing flood of passion, until it should acquire force enough to sweep away all obstructions, it would have been wiser to make channels and conduits to give it easy and safe vent. This part of the Constitution was new, and had, therefore, never been tried by experience. There is nothing like it in the English model, or in any other model known to history. Reserved powers of the people, dormant till roused by a great crisis, then suddenly evoked to deliberate in the midst of a great crisis, on profound and difficult questions of constitutional law and political science, surely this was a new thing under the sun. It looks well enough on paper. This Constitution of ours, thought the Convention, is a wise and good one; it should therefore be guarded and preserved with vigilant care. But time may reveal defects in it that ought to be remedied; may create wants under it that must be supplied. The Constitution, therefore, should be open to alterations, but they should be made only after mature reflection. To secure the requisite caution, the people must not be permitted to vote directly upon proposed changes, but must act through their representatives in Congress, or in the State Legislatures, and through conventions chosen for the purpose. Moreover, as the Constitution is the birthright of the whole people, it should not be altered by a mere majority which may be factitious, or gained by undue influence or the result of transient public excitement. The interests, the opinions and the feelings of a large minority might thus be unjustly disregarded, which minority might be composed of a portion of the people best entitled to respect. As the proposed alterations may affect the rights of the States and their relations to the General Government, they, as such, would in such a case, be entitled to an influential voice, though the vote of a small State would weigh as much as that of a large one. All these points are carefully met and provided for in Article V of the Constitution.

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the *Legislatures* of *two-thirds* of

the several *States*, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by the *Legislatures of three-fourths* of the several *States*, or by *conventions* in three-fourths thereof, as the one or the other mode of ratification may be proposed by *Congress*."

The whole value of this plan depends on its practical utility. It sets in motion enormous forces. Can it restrain and guide them? Will they allow such a bit to be put into their mouths at all; or if they do, where is the arm strong enough to hold them to the track when lashed to their speed? Questions that involve State rights and popular rights, the power of the people and the power of the Government, affect large interests and excite strong passions. An impetuous and influential minority may think itself endangered or aggrieved, a large majority may demand a change, yet despair of obtaining the requisite two-thirds of Congress or of the State Legislatures, or a party controlling these, may refuse to take the initiatory steps, doubtful of the result, and preferring to carry its measures by a vote of Congress. Yet that vote may be either a criminal usurpation of power, or a modification of the Constitution imperatively demanded by circumstances, and in either case it is sure to be made a party question. It would be so difficult to subject such a question to the process required by the Constitution, that the process cannot be relied on. It would fail when most needed, because then neither party would appeal to it. If they refused, the question must be decided by Congress, or not at all, and a decision by Congress, when its authority is denied, settles nothing; may, in a flagrant case, justify resistance, and in any case affords incitements and arguments to meditated and planned rebellion, which, without such show or reality of right might never have been thought of. For clear, unquestionable authority is obeyed even when severely exercised, whilst doubtful, disputed, or manifestly illegal power is resisted on slight grounds, or even only because it is illegal.

The obstacles therefore to be overcome, before the tribunal contemplated by the Constitution for deciding upon amend-

ments to it, can be created, are so formidable, that they tend rather to excite than to repress the spirit of revolution, whilst they are not strong enough to resist it. In England, Parliament is a "convention to amend the Constitution," duly appointed, always in existence, and always competent to entertain proposals for needed alterations, with full authority to decide them. Possessed of undoubted power, Parliament is likely to act with moderation and caution on a subject so momentous, so surrounded by watchful intelligence, by great interests and opposing forces, because any action at all implies great responsibility. But in the conduct of governments as of individuals, it is often only the first step that counts. A government that is guilty of usurpation, has already thrown off responsibility, and relied for success on other supports than the law affords. This is revolution; and when a government cannot be altered to satisfy the people, revolution is a necessity.* It is a remarkable fact that in conservative England, so steadfast in adhering to ancient usage, the power to make changes is always ready to act, without question or form or delay, and the organic law is thus pliable and responsive to the wishes of the people; whilst in democratic America, innovation is guarded against with such jealous care, that it is doubtful whether the means provided by law for making needed changes can ever be employed.

It is also doubtful whether they can ever be used with success, so trammelled are they with conditions and so dangerous are they likely to be in action. The Constitution has indeed been once amended in a legal manner. But this was proposed by the first Congress that sat under it, composed in part of the men who made it, and to satisfy the known wishes of some of the States by which it was ratified. No popular excitement was connected with the amendments, no partisan or sectional interests or passions. They were, indeed, so nearly contemporaneous with the Constitution as to be substantially part of the original structure. The ratification of the amendments was made under the same influences and in the same

* Story on the Constitution, § 1827.

mood of the popular mind which had induced the acceptance of the Constitution, and the whole was thus virtually one act. There was, moreover, nothing in the amendments themselves to divide opinion; for, as all parties agreed, they were really implied in the first plan. For these reasons, the fact that they were peaceably adopted in the appointed mode is no test of it, and gives no assurance of its future success.

The condition of the country has greatly changed since the war of Independence. From three millions we have grown to be thirty-four millions of people, and from thirteen to be thirty-four States. Trade and manufactures have been created and have flourished, and with them wealth has increased. These have been gathered, for the most part, in the large towns, and with them, also, masses of ignorant population; so that the cities, whilst they are the centres of activity, intelligence, and capital, with all their influences increased by concentration, are also centres of that power which is most dangerous in a democracy. From the varied pursuits of the people, indicated by natural causes, have arisen conflicting interests, and contrasted manners and social forms, in different parts of the country. Slavery and the plantation have created, in the South, ideas, habits and desires that distinguish it from the North; whilst the agricultural Northwest is scarcely less divided from the commercial and manufacturing East. These characteristics show, also, different stages of civilization. New England is the country of schools, colleges, towns, manufactures, and concentrated population, where thought is active and intense, because of universal education, general comfort, diversified industry, and the collision of mind caused by easy and constant intercourse. In the Northwest the people are scattered on isolated farms over a vast expanse. They are intelligent and energetic, but rude and uncultivated—enthralled by a single interest and occupation. The electric currents of thought and knowledge do not freely reach them, and therefore opinion forms itself slowly, and lags behind the quick and eager spirit of the East. In the South education is confined

to a small class, governed by a supreme influence and made captive by a social system which directs all thought and endeavor to one idea and one policy.

The Government may press unequally on these powerful sections, and may, justly or unjustly, resist their respective demands. A change may be necessary, to allay discontent, by yielding to reasonable wishes and thus prevent insurrection and civil war. Some contrivance is needed, by which the mature and enlightened opinion of the people may not only act on the measures of Government, but also alter the Constitution; for unless this can be done according to changing circumstances and opinions, physical force is the only resort. But what alterations to make and what will be their effect, are difficult questions, of which not the many but the few are competent to judge. They never have originated with the many, but have always been the work of individuals, or of a very small and select class. This is true of every change in the British Constitution, and every part of its machinery, from Magna Charta down to the Reform Bill. They were all introduced, not by the people, but to meet their wishes and supply their wants. They were never submitted to them for discussion or decision, but were contrived and provided for them by heads wiser than their own, and then adopted by them, because found to answer their purpose.

The average intelligence of the American people is very high—far higher than that of any other in the world. They can appreciate the benefits of good government, and can perceive defects in it; but it is quite a different thing to be able to furnish a remedy. This requires mental power and cultivation of a higher order. The principles of government are a science; so also is jurisprudence, and so is constitutional law, depending on both, and to be interpreted by the lights of both. No small knowledge of each is required safely to alter the Constitution. The multitude, rich or poor, do not possess the knowledge. Few of them have ever read the Constitution or know anything of the various questions that have arisen under it, or the reasoning by which they have been settled. Information of this sort is not the attribute of the many. No property

qualification, however high, would secure a class that possess it. Neither are the masses capable of abstract thought, or able to anticipate the tendencies and remote consequences of changes in organic law. They are not very well acquainted with history, nor can they read or understand Montesquieu, De Lohne, Burke, Vattell, Kent, and Story. They can perceive effects, but only when they happen; they can judge of the results of a law, but can rarely refer them to the true causes. They know what they need, and can feel injustice and oppression. They know the difference between anarchy and order, between poverty and prosperity, between corruption and honesty, between wise men and fools, between virtuous men and villains; but of these things, how to secure the good and how to avoid the evil, they do not know.

They require liberty and security, but the machinery by which these are attained, they cannot contrive, and even when it is constructed for them, they can judge of it only by the effects it produces. For example: an intelligent people demands political power, or the privilege of influencing the measures of government. But the difficulty is how to give them this power, and to contrive some means by which they can exercise it. This end has never yet been fully accomplished, only some approximation to it, by clumsy and inefficient means. The American people think they have got it, because they have universal suffrage and the ballot-box. Perhaps they have only got a sham instead of a reality, and the result of universal suffrage and the ballot-box has been, to place their power beyond their control, in a few unworthy and irresponsible hands. An intelligent people demand of right, power, not only over the action of Government, but its form, that it may be moulded to suit their wants and wishes. They think they have got this power in the fifth article of the Constitution. Perhaps it may turn out that the article, instead of an instrument, as was intended, is an iron fetter, that must be broke, before free action can be attained.

Unless connected with real grievances, abstract questions of government do not interest the people. They are beyond the habitual range of their thought, and they cannot be induced to

entertain them or act upon them at all. Therefore, in quiet times, appropriate to the consideration of the principles of government, such topics cannot be discussed with any prospect of securing such action as the Constitution requires. To put its cumbrous machinery in motion, the people must be roused, and as the most important organic changes are generally connected with the interests of sections or of classes, the people are very likely to be roused by them, to be divided into parties, to be influenced by passion. They thus become a very unfit tribunal to decide such questions, which are not likely to be tried on their merits. The contest would be for victory, not for truth, a wide field and ample opportunity would be given to the arts of demagogues, and how far the struggle would go, and what would be its result, no one, at the beginning of it, could predict.

Yet to such a tribunal does the Constitution submit organic changes, and such a struggle does it invoke. First in Congress or in the State Legislatures the question must be debated, by which the alarm is sounded. Then it must be discussed before the people, that a convention be elected. Then debated again in that convention. Then again before the people or in the State Legislatures. And all these operations are to be performed by the same people and by the same leaders; for leading party men would be the managers of the process throughout. Why might not the subject be safely committed to Congress, a body as much elected by the people as a convention, and therefore, as likely to represent their wishes? What is the difference between the power of the people delegated to Congress and the power of the same people reserved to themselves, except that the former is always ready to act when an emergency makes it necessary, and the latter cannot act without hindrances and delay.

Congress is more amenable to the control of the people than the convention proposed by the Constitution is likely to be, because the former is a permanent branch of the Government, elected at short intervals, so that at every election it is subjected to the popular control. The convention is, indeed, to be chosen by the people, and its work to be submitted to them

for ratification. That done, however, the control of the people, over the convention and over the subject, ceases. The amendment once made, however injurious it may prove, is irrevocable, except by another convention elected by the same difficult forms; for the reserved power of the people having acted, returns to its prison and cannot again act, till summoned in the appointed manner. Is not this power too much hampered to be of use when most needed?

In England Parliament wields the whole power of the nation. But in England, as everywhere else, when the privileges of the people are violated, and their wishes disregarded by the Government, there exists the right of resistance,—a right often exercised in English history, and therefore a custom and part of the unwritten law, undefined, unprovided with legal means for its exercise, but denied by no one. This is the reserved power of the English people, and it is always ready for use, without being trammelled by forms, votes, conventions, or ratifications. By its employment, at long intervals, the English Constitution has grown up to its present symmetry and strength. Coupled with the right of suffrage, this implied and dormant power is a constant check on Parliament, whilst the unquestioned legal authority of Parliament is a check on the people. They influence every measure of Government through the press, the elections, and other organs of opinion, whilst every law affects the interests of members of Parliament. These do not owe their influence in the community to their seats in the Legislature, but are in the Legislature because of their influence in the community, derived from rank, birth, wealth, and character. Land, trade, manufactures, and labor, are all represented in Parliament. Identified thus with the great interests of every class of the people,—informed of their sentiments, and controlled by their votes,—no measure is likely to be adopted by Parliament in opposition to their wishes, or in violation of their rights. Even should this happen, they easily acquiesce, because they know that errors or injustice can be remedied by another Parliament. The interests affected by organic changes in Government are so powerful in England, that changes cannot be

made unless really needed and demanded by the people, and then they can be made by a safe and easy process. With us, the process is so difficult that it can rarely be resorted to at all, and so dangerous, that to use it would be only something better than civil war, for it would be likely to provoke one. It implies more intelligence, and more dispassionate calmness of deliberation, than is or can be possessed by any people.

The terrible war that is now devastating a portion of our country, and creating excitement and alarm over the whole of it, affords an illustration of these principles. No power to legislate for the Territories, in relation to slavery or anything else, is *expressly* granted to Congress by the Constitution. Its words are: "The Congress shall have power to *dispose* of and make all needful rules and regulations respecting the territory or *other property* belonging to the United States." This clause received a construction almost contemporaneous with the Constitution by the first Congress that met under its authority, which prohibited slavery in all the territory then belonging to the Government.

The power of Congress over the Territories was assumed as implied, was afterwards constantly exercised both to permit and to prohibit slavery in territories subsequently acquired, and was regarded as supreme by every branch of the Government, by the Courts, and by all writers of authority, until a recent date. The exercise of the power, on some occasions, gave rise to serious disputes, but the existence of it was never questioned. It was invoked and employed in a very signal manner to settle the contest between North and South for the control of the Territories, in the Missouri Compromise bill, by which slavery was excluded from all the region north of a certain line of latitude, leaving open the question of its admission south of that line, to be determined afterwards, as Congress should think fit. By uniform practice, by judicial decisions, by the formal consent of the nation, the language of the Constitution, if vague, was thus construed, and the construction became as much a part of it as if it had been ex-

pressly made so. Unless this rule be adopted, no law or constitution can ever be settled.

The Southern people, however, became alarmed at the increasing power of the North, and at the growth of opinions hostile to slavery. They fancied they could be safe only by obtaining more political influence for slavery, and that this could be done by creating more slave States. They, therefore, aided by their Northern allies, altered the Constitution by an act of Congress which repealed the Missouri Compromise, on the alleged ground that it was unconstitutional, because Congress had no power to interfere with slavery in the Territories. The act was passed without consulting the people, and without any indication whatever that public opinion, North or South, demanded a change. This high-handed proceeding did not please the Northern people. It defeated the party by whom it was executed, and caused the election of another and new party, pledged to restore the law on its former basis. But the South refused to submit to the decision of the ballot-box. Rather than submit, they determined to break the Union and overthrow the Government. They have attempted to do both, and the result is war.

Could the Convention that made the Constitution have foreseen the controversy to which the clause about the Territories has given rise, they no doubt would have been careful to use language more explicit, as they would have done; if gifted with a prophetic spirit, in other parts of the instrument, the meaning of which has since been, and will be, disputed. But their human powers could not thus peer into the future and foretell the trials to which their work was to be subjected. Had the power been expressly given to Congress to decide constitutional questions, its right to govern the Territories would never have been disputed, but would have been exercised according to the varying wishes of the people. If exercised in a way to wound the sensibilities or to injure the interests of a section, the excitement thus caused would not have been armed with the idea that the grievance was also an invasion of rights,—an idea more apt to rouse passion and provoke resistance than losses

or even indignities. The probability is, therefore, that the South would have submitted to the success of the Republican party without resorting to forcible resistance, just as the North had submitted to the repeal of the Missouri Compromise. Each would have felt that an undoubted legal power had been exerted, and would have felt, also, that over that power each had its fair share of influence or control.

But the power of Congress was denied, and the South would not submit. Why, then, was not the machinery provided by the Constitution to amend it, to declare its true meaning, and thus to avoid civil war, used for that purpose? The reserved powers of the people were ready, indeed eager, to act on the question. They were, it is true, fastened up in their prison house, but there was a key provided which could unlock the door and let them out. How did it happen that no one thought of using that key? The reason is evident. Each party was afraid of the reserved powers, not knowing which they might attack. Indeed, neither party could get control of the key, so carefully was it guarded. Neither North or South could have secured a vote of two-thirds of Congress or of two-thirds of the States, to propose an amendment to the Constitution, or to call a convention for that purpose. Nor could such a convention have made a settlement of the question at issue, that would have been ratified by three-fourths of the State Legislatures, or of the people. A reference to such a convention was, therefore, useless, and neither party would have consented to it. The South, because it would have been impossible to attain its objects; the North, because it had the power of carrying its point without trying a doubtful experiment.

For these reasons the means provided by law for making important alterations in the Constitution are not likely to be employed with success, or indeed at all. Yet changes may be rendered necessary by the war. If so, they will be made. A Government that cannot supply the wants, satisfy the intelligence, or accomplish the objects of a people so eager, so impulsive, so educated as ours, cannot be permanent. Whatever power is essential for these purposes, the Government must possess; whatever part of its machinery cannot perform

its functions, must be altered. A fixed, unchangeable Government, for a changeable, advancing people, is impossible, and were it not so, would be a sad spectacle. Scarcely less so, however, is a Government so contrived that neither the "reserved powers" nor the knowledge and intelligence of the people can be brought to bear upon it, for want of the proper apparatus, and no resource is left but an appeal to arms.

Is such the nature of our Constitution? The question is forced upon us by the present condition of the country. Our career of peaceful prosperity has been interrupted by a fearful civil war. Why did not the Government prevent that war? Whatever the remote or immediate causes of it, there can be no doubt that the vast majority of people preferred peace and Union. The Government, therefore, failed to represent and execute the wishes of the people. If the people loved the Union, the war, as it was not their work, must have been the work of men by them intrusted with power,—of political leaders and demagogues. Therefore, under the Constitution and because of its machinery, politicians and demagogues can rule the country in defiance of the people, and endanger or destroy the Government. The war might have been checked and prevented at its beginning by the President, but it was not. Therefore, the Executive branch of the Government provided by the Constitution is defective, since it has failed to perform its work.

How the war will end no one can predict, or what may be its results. But we may be sure that it will have results commensurate with the great interests it has drawn within its vortex, with the deep passions it has aroused, with the strong forces it has set in motion. How are these to be met, regulated, and controlled? By the Constitution? It has already failed to perform a less difficult task. By amendments to the Constitution? Wherein is it defective? No one has told us, perhaps no one can or will tell us. But, supposing the defects pointed out, who is to contrive a remedy? Are there any living among us, now known, whose intellect and knowledge

fit them for the task, or whose fame and position inspire such confidence, that they could by any possibility be called on to perform it? We cannot summon Hamilton and Washington, Jay, Madison and Marshall from their graves to help us, and the roll of our "statesmen" furnishes no such names. It would be impossible in any condition of public sentiment likely to exist, to employ the means provided in the Constitution for its amendment. The concurrence of two-thirds of Congress or of the State Legislatures, in any proposed plan, could not be obtained, neither would a majority of three-fourths of the States or of the people, accept any that could be suggested. The experiment cannot be made, and would be a rash one if it could. To throw the Constitution or any part of it, affecting important interests and sectional or party passions, to be agitated before the people, excited by recent civil war, would endanger its existence, might renew the struggle on new fields, and end in the entire destruction of the Government, and the separation of the Union into many fragments, instead of two as now threatened. We may therefore set aside the constitutional provision for amendment, as unfit for use now, or under any circumstances likely to be created by the war.

But we cannot throw aside the natural laws that govern society, which declare that a government is made for a people, not a people for the government, and that an intelligent people will have a government to satisfy their intelligence. Either an acorn or the Saxon race, planted in a vessel, made of either clay or paper, too narrow for its expanding force, will break the vessel and become severally an oak, and a free, progressive nation. The reserved power of the people cannot be chained up by fifth articles or by any forms that impede its action, when action is needed. It may well be doubted whether there is or can be such a thing in a political community, as the reserved power of the people, or whether it be possible, in the nature of things, to contrive a government which can be limited or restrained, except by the wishes, convictions, and interests of the nation, expressed by custom, by votes, by the press, by silent acquiescence, or, as Carlyle expresses it, by "not revolting," and if need be, by forcible resistance.

A government must be checked either by these influences or not at all. The received theory of our Constitution is, that it is alterable, not by the Government, but by the people. That is to say, it cannot be altered by representatives of the people assembled in Congress, but it may be altered by representatives of the people assembled in a convention. But suppose Congress made an alteration, which was approved and sustained by the people; that a sudden emergency should arise, when the Government must either exert unconstitutional power or be destroyed. Should the people acquiesce, what power has the Constitution to protect itself? The work of Congress can only be undone by a subsequent Congress, and will be, if the alteration should not satisfy the people, otherwise not. If the change be a wise one and prove beneficial, it will be adopted by the people and become, in time, custom and organic law. So that we get at last to the English doctrine, that Parliament is omnipotent, that is to say, it cannot be legally restrained. Any change in the Constitution may be made by act of Parliament, which may be repealed by another act, if the change is not agreeable to the people. The difference between Congress and Parliament is, that the latter has legal power over the subject, and the former, by the law as generally understood, none at all. But a law that cannot be enforced is a nullity, and so is power that cannot be exerted. The reserved power of the people cannot be exercised, and therefore does not exist. The alleged legal restraint on the power of Congress cannot be enforced, and therefore there is no restraint on it. The whole power of the people, within the sphere of the General Government, does and must, in the nature of things, reside in Congress, and the security of the people consists in their control over Congress by the ballot-box.

But it may be said that the Government itself supplies the check to restrain its powers. This can only mean that the different departments of the Government are a check on each other. The exercise of power, whether by an individual or nation, is naturally divided into thinking, judging, and doing. Action implies all three: thought to originate, will and force

to execute a conceived purpose, judgment to compare it with rules of conduct. These functions in free Governments are assigned to different persons, as if united in one they would be liable to abuse, though their essential character is the same, whether exercised by one or several. When it is said that a Government itself furnishes restraints on its own action, it is not meant that the whole power of Government thus restrains itself, for that would be absurd. The only possible check on Government must be external, not internal, for it is else controlled only by its own volition. But one branch or department of Government may have power to limit the action of the others, and this is meant, when it is said, that our Government furnishes restraints upon itself by which the Constitution is protected. Should it be violated by the united action of all branches of the Government, the Constitution has no protection from within.

To what conclusion, then, does this reasoning lead us? To that at which we arrive by a short road in all inquiries into the nature of Government,—confidence in the persons to whom power is intrusted, and confidence in the people. If they be wanting in duty and intelligence, then all is wanting that gives security to free institutions, and the Constitution is worthless as the notes of a broken bank.

But it is not to be supposed, we may be told, that all branches of the Government will conspire to violate the Constitution, neither is it fair to assume that the people would submit, if they did. They would punish and frustrate such an attempt by the ballot-box. True enough, unless the thing done happened to suit their wishes, their passions, their mental and moral condition, which may be high or low. If low, and sinking lower, they will soon lose all power over the Government and will neither care whether, nor know when, the Constitution is disregarded. But if their spirit and intelligence be high and progressive, and be represented by the persons who administer the Government, it is a supposable case that defects in the Constitution, revealed by experience, should be corrected, or changes demanded by necessity should be made, by the combined action of all branches of the Government, with the

assent of the people, when prescribed forms cannot be observed, either because, by reason of their intricacy, they cannot be applied at all or not in time to meet a dangerous emergency. Thus changes have been made in the English Constitution, which, because it is custom, is far more certain, definite, and positive than ours. Why have those changes been so made? Is it because of any peculiarity of that law, or is it because of a principle inherent in all free and representative governments? If the latter, then we may hope that alterations of our Constitution will be made in the same way, notwithstanding its fifth article.

The English Government has been gradually built up to its present proportions by Parliament, chiefly by the popular branch of it, the House of Commons. The germ of a Parliament or representative legislature, existed in the Saxon institutions at the earliest and rudest period, because the spirit of freedom is inherent in the Saxon race. Neither that spirit nor its outshoot was destroyed by the Norman conquest. The roots of both lived in the soil through the winter of tyranny that followed, and soon acquired strength to appear above the surface. They grew with the growth of the people in power and civilization. The Saxon element proved stronger than the Norman, or rather, Norman and Saxon were of kindred race, lovers of liberty as well as of power, and they assimilated; the Norman creating a House of Lords, or council of the King, and the Saxon a House of Commons, or council of the people. By the touches of time, rough and gentle, for they were subjected to both, by the blood of brave men, and the thought of wise men, King, Lords and Commons were slowly moulded into the present symmetrical structure. Throughout the whole process the House of Commons was the principal agent of change. Incessantly it gained power, because the people were ever acquiring wealth and intelligence, which are the sources and means of power. At length it gained all the power, triumphed over mitre, crown, and coronet and was proclaimed "omnipotent," by which is signified that it possesses the supreme sovereign power of the state, uncontrolled by any superior. It became strong because the

people became strong, and it wielded *all* their strength. It was not fettered by any vague, undefined, "reserved powers" of the people, or imprisoned by the bars and bolts of impracticable forms. The people trusted it with their whole power, and it was faithful to the trust.

It was a slow process, however, this of getting to be omnipotent, resisted by all manner of obstructions,—sword and sceptre, feudal battlements and royal towers of strength. Nevertheless the people triumphed. They triumphed by means of their representatives who were not delegates. They triumphed because they gave to these their whole power, and did not attempt to exercise it themselves, reserving only the right of approving or disapproving what had been done for them in good faith, after it had been tested by experience. They knew what they wanted, but did not know how to get what they wanted, and they intrusted with authority men whose learning and wisdom were adequate to the task. Not one of the improvements of the British Constitution could have been contrived by the people, or proposed by a majority of two-thirds of them, or ratified, after popular debate and the handling of tribunes, by a majority of three-fourths. Yet they got them all, sometimes it is true by rough work and through passages of difficulty and peril; yet they got them. They did not make them. They were made for them by their wisest and best men. The people did not ratify the performances of these by votes and conventions, but by acceptance, by enjoyment, by love and reverence; walls and buttresses stronger to resist rash, passionate, mistaken and dishonest innovations, than any reserved powers or fifth articles that could have been contrived to curb the free yet responsible action of Parliament.

The English Constitution is not without internal checks to regulate the working of its machinery. They are described by elementary writers as contrived to prevent the encroachment of one branch of the Government on the right and authority of another, or of one class or order of the people on the liberty and interests of another. They create that balance of power and balance of interest which secures the steady and

harmonious action of the whole. They all tend to secure the supremacy of the Legislature, and to subject it to the control of the people.

All branches of the Government must unite to make a law, but none of them can long and persistently resist the Legislature, which represents the public sentiment of the day. Parliament is the driving wheel of the engine, but popular opinion is the steam in the boiler. The King can veto a bill, but must do so by his Ministers. He can dissolve Parliament, but only to have another elected by the people, charged with a fresh expression of their will. Lords and Commons must unite in the enactment of a law; but laws for taxing the people must originate in the Commons. Parliament can control the King by its control over the supplies, over the civil list, over the army and navy, over his own income and over his responsible advisers. The Judges hold their offices during good behavior, which secures their independence. It is their province to interpret the law, and to apply it to the cases that arise, but they have no power to declare an act of Parliament invalid. The authority of Parliament is therefore transcendent, though surrounded by restraints; it wields the absolute, despotic power that must exist in every nation, but so long as the people love liberty and reverence traditions and ancient rights, it cannot alter the Constitution against their will.

The English Constitution was not made by any man or set of men, appointed at a particular time, for the purpose. It grew out of the wants of every period of its history, and was slowly built up, by minute changes, to satisfy those wants. It took its shape at every stage of its progress, by virtue of a universal law of nature, that the internal spirit is manifested by external form, that the invisible is represented by the visible, that mind rules matter, and makes of it an instrument to execute its will.

When the Catholic Church and a feudal aristocracy absorbed the education and wealth of England, the priesthood, the barons and the feudal monarch ruled the Government. When commerce and the arts of industry diffused wealth and education among the people, the House of Commons acquired

power. The influence of this third estate increased. It comprises the commerce, the manufactures, the capital, a portion also of the industry of England, but it is balanced by the *land*, by the cultivated intelligence and by the high character of the nobility. The governing classes of the people, perhaps all among them who are fit to govern, are divided into these two. Parliament represents them both, and Parliament is supreme. It could not be otherwise. Absolute rule is eternally the attribute of strength. Given a free people and a representative Government, and the Legislature must be supreme.

So it has happened in England, and so it will happen here, unless our institutions be subverted by the dangerous tendency of a democracy towards despotism,—that is to say, unless the people prove incapable of representative government. The difference between us and England is that we have no class of large landowners, therefore no nobility, and therefore no House of Lords. The Senate, indeed, represents a peculiarity of our system,—the independence of the States. But the Senate is scarcely, on that account, less under the control of the people than the House. Congress, therefore, is practically a House of Commons, without the Lords, as we are the English people without the aristocracy. The power of Congress, therefore, is only the greater on that account, because it is not so likely to be divided against itself.

The powers of Congress are indeed defined, and therefore, it is said, limited by the Constitution. But how can that limitation be enforced? What portion of the machinery of Government provides a check on Congress that does not exist in the English system, under which Parliament has become supreme? The King has an absolute veto, but the President a qualified one, which may be and has frequently been overcome by a vote of two-thirds of Congress.

Suppose Congress, either with or against the consent of the President, should exceed its constitutional powers, where is the check? Every one will at once answer, in the Judiciary. In America, the Constitution is the supreme law, or to state it as emphatically, the law; in England, an act of Parliament

is the law: in both, the Courts are bound to administer the law.

In all discussions concerning an unwritten Constitution like that of England, one question only can arise. Does it suit the present condition of the people? There can rarely be any doubt as to what the law is, for customs are by their nature certain and known. The mere existence of a customary law, moreover, is proof that it is founded on truth, for such only does time respect. But a written Constitution not yet fully interpreted or sanctioned by experience, and therefore still on trial, presents two other questions: what is the law? and does it conform to the natural law inherent in every Government, and which must and will be obeyed?

Let us first consider the second of these questions. What is the natural organic law to which every Constitution must conform or perish? Municipal law is "a rule of civil conduct prescribed by the supreme power in a state."* But how is the power to be applied? Through agents or officers, whose functions are defined by custom, which implies the consent of the people or "state," or by a plan made for the purpose and formally ratified by the people. In either case it is the supreme power of the people, which is employed to make laws, and which when distributed among several, or confided to one person, constitutes a Government. A mere unorganized multitude, however large, though it has power, has no government. The power is latent; potential, but cannot act. When the power of the multitude, with or without restriction, is granted to or obtained by one or several, then Government begins, and its plan or form determines how the power shall be limited and how used.

Government, therefore, may be described as the means or as a machine by which *power* is used for making laws.

Now, what is power? Without entering into any subtle analysis, we may say that it is the faculty of doing anything.

* 1 Blackstone's Comm., 44.

It is an invisible force existing in nature, and revealed by visible effects. It is therefore controlled by natural laws, which cannot be resisted by any human contrivances. The power of man is exerted by will, and will must be preceded by thought. Action, therefore, is the result of thought and will. But action is physical, and there can be no action without physical ability. The power of the people, therefore, consists of their opinions and desires, prompting them to will, with the material force to execute their will. This, too, is the power of Government, which is nothing more than the power of the people, and is derived from the people. When the people grant, willingly or unwillingly, *all* their power of thought, of will, and of physical force, to a Government, they have none left, and that Government is absolute. When they grant a portion of their power, according to the amount retained, and *practically exerted*, they are free. But as they do not possess what they have granted, or what has been taken from them, so they do not possess what they cannot use, although it may have been theoretically retained in their plan of Government. And this result is produced either when the power retained cannot be used, through some defect in the machinery of Government, or because, from its nature, the people cannot use it. In both these cases it has no real existence.

Are not these the laws or fundamental truths that control political power, or those of them that apply to the present topic? Let us consider them in relation to alterations of the Constitution, and the authority of the Judiciary to prevent such alterations.

Power which the people cannot use they do not possess, whether the Constitution reserves it to them or not. When a Government is created, whatever its form, all the power of the people is divided between them and the Government. Therefore, whatever portion of power the people do not keep for themselves, the Government must acquire. Now, power is the faculty of doing something; and whatever the people cannot do they have not the power to do, and no constitution can give it to them. It is because of this inability of the people to do certain things, which nevertheless must of necessity be done,

that Governments are established at all. The people cannot make laws. The power of making laws, therefore, belongs to Government, since there must be laws. The people cannot execute the laws, therefore they must be executed by Government. The people cannot interpret the laws, and apply them to cases as they arise, according to the elaborate legal science which grows up in a civilized community, therefore this function must be performed by Government. All these things, and many others, the people cannot do. But they are things which must be done, and they can be done only by Government.

Can the people alter the Constitution? Not, as already shown, by the means provided in the Fifth Article, or not in all cases,—not when the alteration may be most important, or may be most needed. Indeed, it may well be doubted whether the people are competent for such work at all, any more than they are for making, executing, or administering laws. Yet a change may be absolutely necessary to save the nation from destruction. If the people cannot make the change, they have not the power to make it. Who has? The Government must have it, or the Constitution can be altered only by a revolution.

What then becomes of the power of the people to protect their rights and liberties? It consists of such power as they are able to exercise. They cannot, in the nature of things, possess any other. In Representative Governments they can and do exercise control over the persons intrusted with power, and in this consists their security. In all civilized countries they influence Government by means of enlightened opinion. If these defences fail, force only remains, physical resistance or insurrection, and even this they lose under a military despotism.

If the people can neither make laws nor execute them, nor apply them judicially, nor alter the Constitution—and therefore all these things must be done for them by the Government—it is not easy to see wherein their reserved power consists. Is it not evident that they have really intrusted the Government with all their power, and that the Constitu-

tion, like the Great Charter and other organic Acts of the British Government, is nothing more than a Bill of Rights; declaratory of the wishes and feelings of the people, and enumerating the rights, privileges and immunities they have inherited and desire to enjoy and transmit to their posterity? It is an express and formal statement of these, and a solemn notice to the Government, that all of them are to be held sacred and preserved forever. But what power have the people to keep this Constitution or Great Charter of Liberty, inviolate? The same power possessed by the English people, the privilege of voting at periodical elections, and of dismissing those who shall dare to infringe or destroy it against their will. The Constitution has no other protection, should all branches of the Government,—Legislative, Executive, and Judiciary,—combine to alter it, and Congress, but for the alleged check of the Judiciary, would, like Parliament, be omnipotent.

Can there be such a check, however expressly it may be provided in the Constitution? Is it possible, from the nature of the forces to be applied, so to construct the machinery of Government as to make the Judiciary the controlling force?

Power is the faculty of doing a thing or causing it to be done. What a man cannot do himself, he may do by machinery, or may have done for him by other men, if he can find any competent to the task and can control them. He does this by delegating his power over the object to others. I cannot walk or run forty miles an hour, but I can travel at that rate in a railway train. The moment I enter the car I give up my power over the object sought. The train moves, I am moved. I wish my ship to make a voyage to China. I cannot take her there myself. Nevertheless, I have the power to accomplish my purpose if I can employ some one who has the skill to take her to China. As soon as he is in command of her, I lose the command. But I have no such power, if I employ one who has not the skill; neither can I travel forty miles an hour if I use a trotting wagon instead of a steam car. I have a perfect right to accomplish either object if I can, and my power exists in the choice of compe-

tent agents. I have no other power over that object whatever.

Let us assume that the men who made the Constitution intended to keep the Government, under all circumstances, within its prescribed limits; that they intended that the Constitution should not be essentially altered, except in the manner prescribed by itself. It is asserted that the whole machine was meant to be self-regulating, and that the part of it designed to control the rest, and prevent eccentric action, is the Supreme Court. In other words, Legislative and Executive power are controlled by Judicial power, or are else uncontrolled by any internal force. Should Judicial power prove too weak for this purpose, the others, or whichever of them is the stronger, will reign supreme. It is a vain thing to delegate power that cannot be exerted. Such power has no existence.

Now, which is the strongest of these three branches of Government, the recipients and trustees of the power of the state? Is it the Legislature which originates, thinks, plans, and wills; which represents the people; which is ever in contact with them, receiving fresh impulses from their opinions and feelings and renewed trust at short intervals; which makes the laws and controls the purse and the sword? Or is it the Executive, which neither originates, nor plans, nor wills, nor makes laws, but whose province it is to apply to facts the thought and will of the Legislature, to enforce its laws, which is dependent on it for the means of doing so, and though elected by the people, receives not from them a perpetual, renovating stream of confidence; may, indeed, find that invigorating current wholly withdrawn? Or is the Judiciary stronger than either of these, or both of them combined?

One would think not, from even a superficial glance at its nature. It originates nothing; it plans nothing; it has no will whatever. The thought, the plans, the will of others, are its law. It has no power of spontaneous action. Its faculties are dormant until called forth by a "case." However flagrantly the Constitution may be violated, the Judiciary cannot interfere by word or deed, but must sit a silent, powerless

spectator, unless life and motion be imparted to it by the touch of an attorney. Should the breach of the law be one that cannot give rise to a "case,"—and there may be many such of the gravest character,—or should it not in fact give rise to one,—which may easily happen, for it may do no injury or slight injury or it may do good or suitors may, in troubled times, be deterred by force or terror,—the Supreme Court is utterly impotent. It is impotent, too, should the Legislature think fit to overrule its judgment. Its decree, indeed, may be enforced upon the parties to the suit immediately before it; but suppose the Legislature should disregard its decision, and should be sustained by the people, what could the Court do? It has no purse, no sword, nothing but a legal opinion with which to resist legislative power, armed with these and with popular opinion besides. Such are the opposing forces which the Court would be likely to encounter, for no clear and intentional departure from the Constitution will probably be made, either by the President or by Congress, unless the measure really is, or is supposed to be agreeable to the wishes of a ruling party in the country.

The Judiciary is not elected by the people, and does not therefore represent their wishes or opinions, except their general desire that justice be fairly administered according to law. For this reason the Judges are exempt from popular control. They pass upon the rights of individuals, and therefore should be free from all external influence. They do not make laws, but interpret and administer them by the rules of a difficult science. This science the people do not understand, neither are they competent judges of the qualities necessary to proficiency in it, and as most of its principles are immutable, those who are to apply them ought to be governed only by those principles. An independent Judiciary is therefore all-important. But in a representative government an independent Judiciary is a weak power, because strength comes from the people.

Moreover, the guide of the Judiciary is precedent. The ruling spirit of the people is progress. It is the province of the Judiciary to say what the law is at a given time. It is

the privilege of the people to say what it shall be. But if any part of the law be legally immutable, the Judiciary cannot follow the lead of the people. If the Constitution be immutable, what was law in 1787, must be law as long as the Constitution lasts. To maintain it, therefore, the Judiciary must be stronger than the people, stronger than the representatives of the people. In a popular government this is impossible. It contradicts its elementary principles. The Judiciary is armed with no means of resisting the people or their organ, the Legislature, and its alleged power for that purpose does not exist. The Judiciary has a wide and fruitful field for the exercise of high talents and noble virtues. Our Supreme Court has cultivated that field with assiduous care and distinguished ability, and filled it with choice and most valuable trees of thought and knowledge, bearing golden fruit, but in its soil the tree of political power cannot grow.

No convention can change the respective and very different attributes of Legislative, Executive and Judicial power. The power of the people, delegated to Government, is essentially a unit and differs only in its mode of operation. It may be united in one office or distributed among several, but in each will retain its nature and work after its kind, and will be power thinking and willing, power acting or converting will into fact, and power judging or deciding upon "cases" and the conflicting interests of parties. The object sought in the machinery of a free Government, is not to alter the natural qualities of these functions, for that is impossible, but to avoid the danger of concentrating all power into one hand by furnishing suitable instruments for each function, to keep each in its appropriate sphere. A Constitution must therefore provide that the Legislature shall neither execute its own laws, nor decide upon the rights of parties; that the Executive shall neither make laws nor decide upon the rights of parties; that the Judiciary shall neither make laws nor wield the physical force of the nation to execute them, but that each shall have only so much of the power of the others as may be necessary to protect itself in its own separate province. This object is attained in the English Constitution, it is attained also in ours;

but neither of them does, nor can any, make these several branches of power equal to each other, or prevent that which is stronger than the others by nature from being supreme.

The Constitution cannot make the law-expounding power equal or superior to the law-making power. To make laws implies superiority, implies obedience, for laws not obeyed are no laws. Sovereignty and Legislation are therefore, as Blackstone says, convertible terms, one cannot subsist without the other.* As there cannot be two powers in the same Government each of which is sovereign, it follows that in our system Congress is omnipotent, in the sense that in the English system Parliament is omnipotent. It may be said, this places the Constitution at the mercy of Congress, and thus at the mercy of the blind, passionate, capricious impulses of popular opinion. But the question is, not what is desirable, but what is and must be. In England, as the people acquired power the Legislature became supreme; here, where the people have power, the Legislature is supreme. We have not the influences which give permanence, stability and security to the English Government, because we have not in our population the elements whence these influences emanate. We have not an established church, a landed aristocracy, an ancient throne, all invested with wealth, splendor, legal power and rank, and the prestige of old associations and national traditions. The Convention had no materials out of which to fashion these buttresses and bulwarks to the edifice they were building, for neither a royal family, a nobility, nor a Church existed in the country.

They had only a very intelligent people, composed of the best race, without a privileged class, enjoying great equality of condition and placed amid circumstances calculated to develop their energies and virtues to the greatest extent. We have the same people, with the advantage of seventy years' experience, during which they have prospered under this Constitution, in peace and happiness, up to the present time. It has proved adequate to all their wants, and they have not

* 1 Blackstone's Comm., 47.

wished to change it; on the contrary, their love and respect for it have constantly increased with their numbers, their riches, their intelligence and their power. The Convention had no choice but to make a popular government. When they did so, they accepted all its consequences. We have no choice but to live under one. The people rule. The country is theirs and they govern it. The Constitution is theirs, and they can and will mould and modify it to suit their wishes. We come, therefore, at once to the foundation of all republican government,—the intelligence of the people. If that fail, the Constitution will fail. If the people prove unfit for freedom, they cannot maintain free government, for its essence consists in the exercise of power by the people.

We are committed to the experiment. The Constitution has failed to protect us from the calamity of a bloody and destructive civil war; but it does not follow that free government is to fail. That will depend on the people, and their intelligence, prudence and patriotism are likely soon to be tested. The great principles of the Constitution are true. The machinery by which they were meant to be carried out is for the most part well contrived for the purpose. But its defects must be corrected. What they are and what is the remedy are the problems presented by the war.

We must expect that changes will be made, perhaps great changes, and they ought to be made by Congress, for they cannot be made by the Fifth Article, nor can the action of Congress be resisted by the Courts. Why should they not be made by Congress, if demanded by necessity, as they would be by an English Parliament? Should they be approved and ratified by the people, what is the difference, whether their consent be expressed by a Legislature or by a Convention which they have elected, or before or after the alteration is made? It would still be the wishes of the same people carried into effect. If the people should be dissatisfied, they can say so through another Congress. If they continue to be satisfied after the alteration is tried, it would be thus established as a precedent to be engrafted on the Constitution, as is the case in England.

Such would be the natural result, for the tendency of all law is to resolve itself into precedent or custom. But the peaceful settlement of such questions here is obstructed by the want of undisputed legal right in the Legislature to dispose of them. There is thus a conflict between its inherent, necessary power, and its constitutional authority, which gives rise to many embarrassing and dangerous doctrines. Whenever the limits of authority are found to be too narrow, they will be broken. But will they stay broken? And how can such questions ever be settled? The Constitution is the permanent, supreme law. But is the construction put on the Constitution by the practice of the Government and by judicial decisions, the supreme law? Not so according to some. The Constitution is to be interpreted only by itself, and a thousand years hence it will be still the Constitution, unaltered and supreme. The Constitution being new, many parts of it are of necessity doubtful, and, like a statute, it can only be settled by interpretation, as, from time to time, it is applied to facts. Therefore, a constitutional question is almost sure to arise, and has frequently arisen, on important measures of Government, which meet opposition, and all such are opposed. The argument is very convenient. It is easily made, it is not easily answered and it can never be silenced. The right of Congress to establish a Bank, to impose a Tariff, to make public improvements, to legislate for the Territories, and other questions, have been doubted, discussed, and settled, so far as the Government and Court could settle them. They were all opposed on constitutional grounds, but whenever debated they are still opposed on the same grounds. A recent example of this was the case of Dred Scott, when the practice of the Government and the decisions of the Courts, ever since the Constitution was made, were set aside, on the ground that they had violated the Constitution. These questions are ghosts that cannot be laid, so long as the Constitution is regarded as a finality in itself and by itself, without regard to the custom which has grown up under it.

Another mischievous effect of the denial of power in Congress to settle constitutional questions is, that every such

settlement is regarded as a violation of right by the party that opposes it,—a wrong, therefore, which justifies resistance. The Constitution has been broken by the Tariff, said the Southern people in 1833, and we have a right to oppose it by force; and they carried their opposition to the verge of rebellion. The Constitution has been broken by the exclusion of slavery from Kansas, said the same people in 1861; and they did rebel. In England this pretext for treason cannot be used, for there are no limits to the constitutional power of Parliament.

But a breach of the Constitution not only justifies resistance because it is a wrong which admits of no other redress, but, as some contend, it dissolves the Union, and releases the citizen from the obligations of allegiance. There is, indeed, properly speaking, no such thing as allegiance in this free country; no such thing as "subjects," of course,—not even citizens. The Constitution is an express, formal, written contract between the people and the Government, to which people and States are parties. Now, in law, if a contract be violated by one of the parties, the other is released. If there be no common arbiter, each party must judge for itself of the fact of violation. But in this case there is no common arbiter, for the constructions put upon the Constitution are not a part of it. When, therefore, the Northern States "seceded from the Constitution" by refusing to execute the Fugitive Slave law, and the Government refuses or fails to enforce obedience, the contract is broken, because the Constitution is broken; the Union is, *ipso facto*, severed, and the States are restored to their original condition of independent sovereignties.

These disorganizing notions have had immense influence in causing our present difficulties. They form the creed of sections and parties, and indeed they spring logically from the principle that a written Constitution is and must remain a finality forever, to be interpreted only by itself, and to be altered only in the manner appointed by itself, by the "reserved powers" of the people,—not by the power they have delegated to the Government. The fatal influence of the deductions thus made has been greatly enhanced by another doctrine, drawn partly, indeed, from the same prolific source of

confusion, but so unphilosophical, and so subversive of order and the harmonious action of Government, that but for the respectable names connected with it, it would be scarce worthy a passing notice.

Mr. Jefferson declared that "each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution, in the laws submitted to its action,"* and his own conduct as President was guided by that opinion. General Jackson had the same ideas. They have not indeed been sustained by the best writers on our Government. Nevertheless, the doctrines are still alive and influential, for we find them asserted in an opinion of the present Attorney-General, Mr. Edward Bates, on the suspension of the writ of Habeas Corpus, given in obedience to a requisition made by the President, July 5, 1861.

He says, speaking of the different departments of the Government, "They are co-ordinate and coequal, that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both together. . . . Now, if we allow one of the three to determine the extent of its own powers, and also the extent of the powers of the other two, that one can control the whole Government. . . . Our fathers, having divided the Government into co-ordinate departments, did not even try (and if they had tried would probably have failed), to create an arbiter among them to adjust their conflicts, and to keep them within their respective bounds. They have left by design, I suppose, each independent and free, to act out its own granted powers, without any legal superior possessing the power to revise and reverse its action. . . . In this view of the subject, it is quite possible for the same identical *question* (not case) to come up legitimately before each of the three departments, and be determined in *three different ways*, and each decision stand irrevocable, binding upon the parties to each case; and that for the simple reason that the departments *are* co-ordinate,

* Story on the Constitution, § 374.

and there is no ordained legal superior with power to revise and reverse their decisions."

One would think that this was the *reductio ad absurdum*, but he goes on. "To say that the departments of our Government are co-ordinate, is to say that the judgment of one of them is not binding on the other two, as to the *arguments and principles* involved in that judgment. It binds only the parties to the case decided. But if, admitting that the departments are co-ordinate, it be still contended that the principles adopted by one department are binding upon another, that obligation must be reciprocal. That is, if the President be bound by the principles laid down by the Judiciary, so also is the Judiciary bound by the principles laid down by the President; and then we shall have a theory of constitutional government flatly contradicting itself. That cannot be." No indeed, neither can we have a theory flatly contradicting nature, truth, and reason, like that announced by the Honorable Attorney-General, and producing such inextricable confusion, that the wonder is that whilst propounding it, he did not see that he was confuting himself, and that it was impossible to impute to the founders of our Government the design of causing such outrageous results. Co-ordinate, coequal powers. Can such things exist in a Government? and if they could, would any wise Convention think of introducing them, unless for the express purpose that they should wrangle and fight, as Mr. Bates says they would; for he says it is "quite possible" that the same question would be determined in *three different ways* by the departments. Of course, as the action of each is naturally independent, the same question might be determined differently at different times. Indeed, as the Constitution is a complete whole, and constructions put on it are no part of it, every one may construe it as he pleases. Therefore, there is no Constitution. And as the departments of Government are co-ordinate and coequal, and each may pull different ways, and each disregard the action of the other, may we not say also, we have no Government? Three different powers of Government, each supreme; three different forces of precisely equal strength. If such could be put into a material machine,

they would neutralize each other, and it would come to a dead lock.

The various doctrines above stated are not reasonable, they are not supported by the best authority, they are inconsistent even with the controlling power of the Supreme Court, and they have all grown out of the principle that our Government is one of limited powers, which cannot be exceeded by any branch of it, unless there be a change in the Constitution, made by the "reserved powers" of the people, in the way prescribed in the Fifth Article. They are the pestilent brood of the false principle that power is divisible and can be, at the same time, granted and withheld and that supremacy can be given to weakness, when it is brought into conflict with strength. These notions, however untrue, have nevertheless exerted a powerful influence over our politics. What can any thinking man say of them, except that they are the very formulas of chaos, anarchy and misrule? If they prevail, the Constitution cannot stand the shock of this war. They have been, indeed, to a great extent, the cause of the war. If the Government is to be saved, it must be by the truth that is in the Constitution, not by its errors or by the erroneous interpretations put on it. It has truth enough to save it, if the truth be allowed legitimate sway. It has distributed power among three departments, the Executive, the Judiciary, and the Legislative. The Legislature makes laws, and represents the people, and is therefore supreme. This truth is a natural law; it has carried our English ancestors through the stress of many dangers and it can save us in this,—the first storm our ship of state has encountered.

The above argument may be illustrated by recent examples in our history. We have said already that a Government must have power sufficient to protect the public safety, and that, should the limits of its authority be found too narrow for that purpose, those limits will be broken, for necessity supersedes all law. We have said that a case might occur, when the Constitution would be infringed by the Legis-

lature or by the Legislature and Executive together with the consent and approbation of the people, when it was impossible or imprudent to await or to attempt the uncertain and tedious process appointed in the Fifth Article. We have said also, that the Judiciary is naturally the weakest department of the Government and should a contest arise between it and the Legislature, the latter would prevail.

All these events have happened. On the 4th March, 1861, Mr. Lincoln became President of the United States. In the interval between his election and his inauguration, a rebellion, planned in expectation of these events, was organized. Its object was to dissolve the Union and to erect an independent nation in the South. Many of the leading conspirators were in Congress and in the Cabinet of the President, Mr. Buchanan, and employed their official authority to destroy the Government. The rebellion had assumed formidable dimensions before Mr. Lincoln came into office. It was enlisting and equipping troops and organizing civil power. When Mr. Lincoln became President, he found Washington threatened, surrounded by hostile territory, its population and that of the adjacent States disaffected and ripe for insurrection, the Treasury plundered, arsenals stripped, the army and navy scattered and treason lurking among its officers and in every civil department also.

Prompt measures were evidently necessary, if the President meant to save the nation, and he took them. Congress was not in session. Without hesitation he exercised powers, which, if not really doubtful, according to the just construction of the Constitution, were doubted then and since, by himself and others. He called out troops, he enlarged the army and navy, he arrested and confined persons suspected of treasonable acts or designs. When Congress assembled, they ratified, expressly or impliedly, everything he had done. The arrests continued. The freedom of the press was suspended, members of a State Legislature were imprisoned on the eve of its meeting; over the whole country was stretched the arm of a discretionary power, paramount to the Constitution. Con-

gress did not interfere, and up to this moment, still in session, has not interfered, even by remonstrance.

On the contrary, as the strength of the rebellion and the necessity for extreme measures have become apparent, Congress has entertained and is now debating plans which greatly exceed the powers granted by the Constitution, plans for a general emancipation of all the slaves in the South, for the confiscation without trial of the property of rebels, for reducing the rebellious States to the condition of Territories, and other projects, some of which, though opposed on the ground that they are unconstitutional, will no doubt be executed. Meanwhile, the people are thoroughly aroused by the war, their intelligence is called into eager exercise, the press carries into every remote corner information of all that is done, and countless debates and discussions in and out of Congress. Yet the people give to these proceedings their hearty approbation. They see the Government overstep what have generally been considered its constitutional limits every day, and they rejoice.

In this drama the Judiciary has not been wholly an idle spectator. But it has no power of spontaneous action, and once only has the hand of a suitor unlocked its lips. In Merriman's case it spoke, and it spoke to denounce the action of the Executive. But its decision did not even affect the case before the Court, and although made by the Chief Justice himself, has been wholly disregarded both by Congress and the President.

Now what is the meaning of all this? Does it not show that the Judiciary is weak, and the Executive and the Legislature strong? Strong from inherent power, but a hundred fold strong when supported by the people. Does it not prove that the power of the people cannot be checked and curbed by Fifth Articles? Who but a madman would now propose recourse to the cumbrous forms of amendment appointed by the Constitution? Are not the people now exercising their "reserved powers" by acquiescence, by eager support, by enthusiastic applause? How else can they exert these powers? and if they cannot, is it not clear that they have not been reserved?

That Government must and does, in the nature of things possess, not a part, but the whole power of the people? If the people are dissatisfied with what has been done, they can say so at the next election, and then it can be undone.

The superiority of legislative to judicial authority may be illustrated by another example. As already stated, Congress has from the beginning exercised complete authority over the Territories on all subjects, including slavery. In the year 1856 the Supreme Court discovered that this authority was not granted in the Constitution, so far as slavery was concerned; that slavery existed potentially in all the Territories, by virtue of the Constitution, and that it is the duty of Congress to protect it whenever it should exist in them as a fact. But Congress refused to accept that decision of the Court, the people have reversed it, and it will probably be reversed in express and formal terms by Congress.* What can the Supreme Court do? The Executive, the Legislature, and the people are all opposed to it. It is utterly powerless. Yet, it is said, the case of Dred Scott is law until reversed by the Court. It would not be either a safe or an easy process to reverse it by the Fifth Article.

All the measures executed or proposed, for carrying on the war are defended on the ground that they are necessary to save the nation. Is not this another way of saying that Government has unlimited powers? They are justified as war measures. The Constitution, it is contended, has invested the Government with power to quell rebellion by force of arms, and war has its own laws, paramount to all others. The country is therefore said to be under martial law. But war is another name for necessity, and authority to meet it is sought outside of the Constitution, which *does* provide for a state of war, but not expressly or sufficiently. Would it not be as logical and more candid to say at once, that the whole object of any Constitution must be the defence of the nation and the Government, and therefore no measures necessary for that

* This has since been done by a bill prohibiting slavery forever in all the Territories.

purpose can be unconstitutional? That the people must be supposed to have delegated for this supreme end all their power, even the power of transcending the limits of the Constitution? That when this is done with the consent and approbation of the great mass of the people, such consent and approbation must be regarded as a ratification, complete and effectual, as if given according to the forms of the Constitution.

I have thus endeavored to show that the doctrine that the Judiciary has power to preserve the Constitution and to keep the other departments within their appointed bounds, is not in accordance with those natural laws to which every government must conform. That such power, therefore, has no existence, for it cannot be created by the vote of a Convention. I have endeavored to show that by the same natural laws the Constitution is not a finality, to be construed now as it was understood, or supposed to have been understood, at the time of its adoption, without reference to usage and custom and changes of public opinion.* I have endeavored to prove also that such a thing as a Government, with departments possessing co-ordinate and coequal powers cannot exist, but that of the three departments, the Legislature or law-making power, is of necessity supreme, and the delegate of the whole power of the people. Let us now inquire what the Constitution does really say, or what may be fairly implied from its language on these points. We know that it must conform to the truth of nature or perish. But the discrepancy may be partial only, and the vital force of the remainder may be sufficient to save the structure. Or it may contain within itself renovating and redeeming principles, that will cause a new growth to complete its symmetry and secure its life and efficiency. We may be sure of one thing, that whatever portion of the Constitution is unnatural, that portion must be got rid of by some process or

* See report of the decisions of the Supreme Court of the United States, in the case of Dred Scott *vs.* Sanford, 426.

other; and now in the midst of war and looking to the probable and possible results of war, it is worth while to inquire if that process may be easy, peaceful, and constitutional, or whether it must be violent and destructive; whether we too, like our English ancestors, cannot make changes in our organic law, without a revolution.

And first as to the alleged check of the Judiciary. The provisions applicable to this subject are as follows: "The Judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If we could read these clauses without reference to contemporaneous or subsequent interpretation, their meaning would be clear enough and their necessity obvious. This Government is a union of States, sovereign within their appropriate limits. It is also a nation, with a central Government, for national purposes, paramount to those of the States. A uniform law, therefore, is essential, which there could not be, if the various States could each put their own interpretation on the Constitution, or attempt to repeal a law of the United States. To say, therefore, that the judges of the States are bound, not by the laws and constitutions of their respective States, but by the laws and Constitution of the United States, when the two are in conflict, is merely to declare the purpose of the Constitution itself, that Federal or National shall be superior to State authority.

When the Supreme Court, therefore, overrules a decision of a State Court or sets aside a law or Constitution of a State as invalid, because inconsistent with a law or with the Constitution of the United States, it is acting in its legitimate sphere, as the expounder, the interpreter, the minister and

subordinate of its own law-making power. The Federal Courts are superior to the State Courts, just as the Federal Legislature is superior to the Legislatures of the States, but it does not follow that the Federal Courts are superior to the Federal Legislature, nor is that conclusion necessarily implied in the language of the Constitution. The Constitution and the laws made in *pursuance* thereof, shall be the supreme law of the land. The word pursuance has two meanings in popular use. One of these is *conformably to*, but the other and more correct interpretation, because in accordance with the signification of the verb whence it is derived, is, in prosecution or execution of anything. The first part of the clause is connected with the second by the word "and," thus controlling the second, and giving to the laws and Constitution of the General Government, supremacy over those of the States, making the former, indeed, "the supreme law of the land." The use of the word "*supreme*" in any other sense was unnecessary, for supremacy was implied in the words Constitution and laws. It is fair to suppose that if the framers intended to invest the Judiciary with the extraordinary *political* power of controlling the Legislature, they would have said so in explicit terms, for "judicial" does not mean political power, more especially as the Judiciary has no such power in the English Constitution, which was necessarily their model, nor in any other Constitution known to history. They did intend to make the General Government, in its sphere, supreme over the State Governments, and they expressed that intention in this very article, and in language not to be misunderstood. There is nothing in that language to show that they had any other meaning, nothing to show that they intended to invest the weakest of the two departments of the Government which are necessarily subordinate, with controlling power over both the others.

But I bow to authority. The words "in pursuance thereof," have been interpreted to mean in conformity therewith, and the word "supreme" has been held to apply to the Federal as well as the State Governments. I shall not imitate the bad example I have censured, by attempting to construe the Con-

stitution by itself alone, without regard to practice and precedent and judicial opinion, but proceed to examine the law as these have made it.

No elaborate investigation is necessary for this purpose, for the principle that the Federal Courts have power to declare an act of Congress which violates the Constitution, null and void, is too well established to be questioned. The first, and perhaps the highest, authority on the subject is that of Hamilton, in the Federalist (No. 78), highest because he helped to make the Constitution. He says: "The Courts were designed to be an intermediate body between the people and the Legislature, in order to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be, regarded by the Judges as the fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute; the intention of the people to that of their agents. . . . Where the will of the Legislature, declared in its statutes, stands in opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter rather than the former."

But a statute is not to be described as the will of the Legislature, but of the people who elected the Legislature. The meaning of the above language then is, that when the will of the people of 1787, declared in the Constitution, is in opposition to the will of the people of 1862, represented in the Legislature, the Judges are to be governed by the former. It may be said, indeed, that the Constitution is to be regarded as the continuing and paramount will of the people, until altered in the appointed manner. But, should the will of the people change and the appointed mode of alteration be found impracticable, the consequence would be that the people of

1862, must submit to the people of 1787. And what branch of the Government is selected to perform the difficult task of coercing them? The Judiciary; that which Mr. Hamilton, in the same essay, had just declared to be "beyond comparison, the weakest of the three departments of power," and quoted Montesquieu for saying that it "is next to nothing." In such a crisis as the present, how can its puny arm resist the Executive, the Legislature and the people, the first two making changes, and the last consenting to them?

It is unnecessary to encumber our pages with a list of cases in support of the principle laid down by Mr. Hamilton. The best writers speak of it as a well-settled doctrine of our law. It is thus forcibly stated by Chancellor Kent: "The people of the United States have declared the Constitution to be the Supreme Law of the land, and it is entitled to universal and implicit obedience. Every Act of Congress and every Act of the Legislatures of the States, and every part of the Constitution of any State, which is repugnant to the Constitution of the United States, is necessarily void. This is a clear and settled principle of constitutional jurisprudence. The Judicial power of the Union is declared to extend to *all cases* of law and equity, arising under the Constitution; and to the Judicial power it belongs, whenever a case is judicially before it, to determine what is the Supreme Law of the land."*

So spake a great Judge and lawyer. But, regarding the subject from another point of view, that of a law-maker, it is obvious, from this language, how weak a check the Judiciary must be. "Whenever a case is judicially before it," the Court may declare the supreme law, in opposition to the Legislature. But what provision is there for violations of the Constitution, that for various reasons—heretofore mentioned—do not give rise to "*cases*" or controversies between individuals, and cannot, therefore, be brought before the Court? For these there is no check, yet, they may be of a character to alter the whole structure of the Government. What, then,

* 1 Kent's Com., 293.

are we to think of a power thus partial in its operation, and which cannot act at all when most needed?

The impossibility, if not absurdity, of attempting to make the Judiciary paramount to the Legislature, seems to have quite bewildered Judge Story, in his discussion of the subject, for it is not easy, at least for an "unlearned" reader, to arrive at any definite conclusion from what he says. He tells us that, "In *many* cases the decisions of the Legislative and Executive departments become final and conclusive, being incapable of revision. Thus, in measures of an exclusively *political* Legislative or Executive character, it is plain, that as the supreme authority, as to these questions, belongs to the Executive and Legislative departments, they cannot be re-examined elsewhere. Thus, Congress having power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal. So the power to make treaties being confided to the President and Senate, when a treaty is properly ratified, it becomes the law of the land, and no other tribunal can gainsay its stipulations. Yet, cases may be readily imagined in which a tax may be laid, or a treaty made, upon motives or grounds wholly beside the intention of the Constitution. The remedy, however, in such cases, is solely by an appeal to the people at the elections, or by the salutary power of amendment, provided by the Constitution itself."*

This opens an extensive field in which the limited powers of the Government are unlimited, so far as the Judiciary is concerned, and war, taxation, commerce and foreign intercourse embrace large interests of the people. Again, he says: "If the Judicial department alone should attempt any usurpation, Congress, in its legislative capacity, has full power to abrogate the injurious effects of such a decision. . . . . The worst that could happen from a wrong decision of the Judicial department, would be that it might

* Story on the Constitution, § 374.

require the interposition of Congress.* If the usurpation should be by the Judiciary, and arise from corrupt motives, the power of impeachment would remove the offender; and in most other cases, the *Executive and Legislative* authorities could interpose an efficient barrier. A *declaratory or prohibitory law would in many cases be a complete remedy.*"†

Here, then, we have the checking power checked, Executive and Legislative now subordinate and now paramount to the Judiciary, and Congress authorized to declare what is the supreme law, in opposition to the Judges. This extraordinary confusion of ideas is the result of an effort to carry out false principles, from which no consistent or harmonious consequences can be deduced. A Government limited by internal power is an impossibility. There is no such thing in nature as the delegation of a part only of the people's power. It is impossible that the weakest of the three Departments of Government shall exercise control over the others, for to govern is eternally the attribute, not of weakness but of strength, which belongs, under republican—more especially under democratic—institutions, to the Legislature.

The attempt to erect the Judiciary into a tribunal to decide upon violations of the Constitution, grew out of the attempt to make a Government of limited powers.‡ Restricted authority was intrusted to the Departments by the people, but "*quis custodiet ipsos custodes;*" who shall keep those Departments within their appointed bounds? "One of them," says Mr. Hamilton. But suppose that one transgresses? "Then another of them," says Mr. Story. Which, therefore, is supreme? "Neither of them," say Mr. Jefferson and Mr. Bates; "all are equal, each is sovereign."

If it be a vain attempt to make things equal that by nature are unequal, and to divide that which is by nature indivisible, it is also useless to try to alter the character of judicial power and convert it into political power. The makers of our Con-

* Story on the Constitution, § 377–384.

† Story on the Constitution, § 394.

‡ Federalist, No. 81.

stitution dreaded the proverbial instability of popular opinion. They feared to commit their work to its uncertain and dangerous billows. Hamilton, Washington and others, regarded democracy as a very doubtful experiment. They made the Constitution as conservative as they dared to make it, but they knew well it was a fragile bark, freighted with a precious cargo, and launched on the waves of a treacherous and tempestuous sea. They looked in vain for the elements that give strength and endurance to the British Government, the Church, the aristocracy, the throne, each connected with the past and the future, each presenting bulwarks like rocks to the surges of popular passion. The Convention could use none of these buttresses for their edifice, because the materials out of which to construct them did not exist in the country. Both Legislative and Executive power must be made the organs of the masses. Executive power, in their system, must be merely executive. It could not, like the English Throne, be the representative of the whole people,—not of a party,—the visible manifestation of the collective majesty of the nation, connected with the past by its traditions, with the future by its interests and hopes, and the type of permanence in the midst of change; therefore the constant refuge and protection of a minority and of a weaker party in the State.* The sway of the people,—that is to say, of a majority,—would act, it was easy to see, with full and unrestrained force on the Constitution, on *both* branches of the Legislature, and on the Executive. How, therefore, was the Government to be protected from incessant changes? How were the States to be kept within their orbits,—how the General Government to be restrained from usurping power,—how the different Departments to be held to their appointed tracks? Was it not evident that the Legislature, representing the unchecked will of the majority of the people, would speedily engross all power? The dread of the Legislature is seen throughout the pages of the Federalist.

In England the Peers represent a class, the Commons other

* For the important part played by Royalty as the representative of the people, in European history, see Guizot's History of Civilization.

classes; but the King represents all. His power, his dignity, his perpetuity, are derived, not from a party or a class, but from the nation. In America the Senate represents the States as such, the House the people, the President the people; but really and practically they all represent a party, because elected by a party. If there is a conflict between them, it is a conflict of parties; if they all agree, it is because they are all elected by the same dominant party. Neither of them is elevated above the reach of party influence,—that is to say, of capricious, passionate, often ignorant and reckless popular influence. Neither of them expresses the idea of nationality, of endurance. Neither of them can be a secure shelter for a minority, for a defeated and oppressed party, or a menaced or oppressed class.

This was evident to the Convention, but where was the remedy? There are but three branches of Government, and the Legislative and Executive were of necessity yielded to the people. The Judiciary alone was left. It is naturally the representative of the law. They made it the representative of the Constitution, which they called the Supreme Law. They tried to give stability to this supreme law by making it almost unalterable, and by the fiction of the "reserved powers" of the people, and they set up the Judiciary as the sentinel over the Constitution, and the agent and representative of these reserved powers. Alone of all the departments, it was not elected by the people, nor was it dependent on them, or on any other power, for its continuance in office, or for its emoluments. It could not, therefore, be affected by the fluctuating tides of party power, or by the wild sallies of popular sentiment. If the Government was not to be a total failure in its normal and healthy action, Judges would be appointed of whom conservative sentiments might safely be predicated, because of their age, their learning, and their virtues. The Supreme Court was, therefore, the fit representative of the idea of stability, of perpetual endurance, of the Constitution, the one thing intended to be permanent amid the ever-shifting sands of democracy.

But man proposes and God disposes by his eternal laws.

Not this, but something far different is the true function of a Judiciary. Its natural province is to interpret and apply the law; the *law* made for it by the law-making power. It must work after its kind, like steam or acid and alkali, or not at all. To make it the representative of the reserved, or any other power of the people, to place it over the Legislature, is to invest it with political and deprive it of judicial character, or rather to destroy it altogether. The attributes of both it cannot have. It cannot play the part of royalty and be the representative of the whole people, because it cannot take part with a class or interest which may be threatened with injury; it represents only the law, which knows no class or interest. It cannot protect the Constitution, because, as already said, it has no power of spontaneous action, and the Constitution may be destroyed before its face, and it cannot move a finger, unless the breach be one that can, and actually does give rise to a case.

Constitutional questions, moreover, are generally party questions. The most important of them must almost necessarily assume this character, and excite feeling and passion according to their importance. To decide such questions would necessarily give to the Court a partisan aspect, make it apparently the champion of one set of opinions, of a class, a section, or an interest; and as judges are after all men, would have a tendency to stimulate their own party feelings, and bias their judgment. If they possess political power, they will necessarily possess party power; they will be tempted to exercise it for partisan objects; they will be appointed, therefore, with reference to those objects, and the Judiciary would thus morally be swept into the vortex of the elections. It would no longer be a Judiciary, but a party organ. It would represent not stability, but instability, and become, not a judge, but an advocate. The Courts would thus be placed in a false position. They would lose the confidence of the people, and when that is lost, reverence for the law and security for all right will soon be lost with it.

In the Federalist and the Commentaries of Kent and Story, which treat of our Constitution, it is assumed that any viola-

tion of its provisions must be made with a dishonest purpose, and the Judiciary is described as a check upon *corrupt* usurpation of power. The exercise of unconstitutional or doubtful authority, for a worthy and beneficial object or as a necessity to save the Government from destruction, is not supposed. The plan of amendment provided in the Fifth Article, it is taken for granted, will be adopted, and prove sufficient for all such cases. But should it not be sufficient, should there be no time to apply it, or should its obvious unfitness prevent any party from even thinking of appealing to it, the position of the Supreme Court would become one of much embarrassment. And such is precisely the case now presented. The Government has exercised and will exercise doubtful powers. Its opponents say that it has already exceeded the limits imposed by the Constitution; its friends, before the war is over, will probably be obliged to confess that it has done so. It has acted in good faith. It has acted under the pressure of an extreme emergency. It has been sustained by a vast majority of the people. Yet, for the Courts, we are taught, the Constitution is the only law.

Must a Court, then, put itself in opposition to the Government, and declare null and void important measures intended for the defence of the nation, and received as such with acclamations by the people? The Court would thus become, in the eyes of the people, the champion of secession, the friend and ally of rebellion and treason. Yet what other course is open, if it be the right and the duty of the Judges to set aside, as invalid, every act of the President or of Congress which exceeds the limits of their prescribed authority? The Judiciary is called the appointed guardian of the Constitution,—the representative of its stability, its perpetuity. But should the Court attempt to maintain this character, a contest between it and other branches of the Government would be inevitable. In this contest, if the Court be sustained by a considerable party among the people, it will be virtually the leader of that party, and the result may be civil war, not between North and South only, but throughout the country,—not, surely, a consistent or appropriate position for the Judiciary to hold. On

the other hand, if the Government be sustained by the people, the decrees of the Court will be wholly disregarded; it will lose influence and respect, and with these, dignity and authority. Already, as before stated, the Court in the beginning of the war, attempted to set itself against the Government, and its opposition was instantly swept aside by the impetuous rush of events, of opinion and of passion. Its voice could scarcely be heard amid the tumult and din of elemental strife. As the war advances, the ability of the Court to check the Government is not likely to increase. It will become evident to all men, indeed, that it is no check at all; that judicial is something very different in its nature from political power, and that a judiciary must be judicial, or cease to exist.

What, then, is the authority and duty of the Supreme Court to preserve and protect the Constitution? Is it not by the exercise of judicial power, just as it is the right and the duty of the President to defend it by the exercise of Executive power? Judicial is and must be coextensive with Legislative power, each acting in its own sphere,—the Legislature to make laws, the Courts to interpret and apply them. Fundamental, organic, political laws, establishing a form of Government, whether written or unwritten, are the Constitution of a State; they are the birthright of a people, their established manner and rule of living as a nation, and are of so high and important a nature, that in every system they are either expressly or impliedly excepted out of the ordinary powers of the Legislature. The Legislature *ought not* to alter them, except for grave and obvious reasons, and with the assent of the people, given either expressly by votes or impliedly by silence,—by acquiescence, by the press, and other official and unofficial organs. These are the general principles of all free Governments. Our ancestors intended to embody them in the Constitution. They were stated with clearness and force by Vattel, before the Constitution was written.

"The Constitution of a State ought to be fixed; and since that was first established by the nation, which afterwards

trusted certain persons with the legislative power, the fundamental laws are excepted from their commission. . . . Legislators derive their powers from the Constitution. How, then, can they destroy it without destroying the foundation of their authority? By the fundamental laws of England, the two Houses of Parliament, in concert with the King, exercise the Legislative power; but if the two Houses should resolve to suppress themselves, and to invest the King with the full and absolute Government, certainly the nation would not suffer it. And who can presume to say they would not have the right to oppose it? But if the Parliament entered into a debate on making so considerable a change, and the whole nation was voluntarily silent upon it, this would be considered as an approbation of the act of its representatives."*

In England there is no legal bar to the power of the Legislature. But in any Government, when a change is required by necessity and demanded by public opinion, it will be made, for self-preservation dispenses with all laws and forms, and every Government is and must be invested by nature with power sufficient to accomplish the end of Government, which is the public safety. Every Government, also, has and must have sufficient power to satisfy the majority of the people, for the power of the Government is the power of the people. In the case supposed, of an infringement of the Constitution demanded by necessity, honestly made, and acquiesced in by the people, what is the duty of the Supreme Court? We have already shown that practically it has no power. Is it nevertheless bound to set itself in opposition to the Legislature and the people?

This question is answered by determining what, under such circumstances, would be the duty of the Legislature. Judicial power is, all agree, coextensive with Legislative power. Judicial duty is therefore coextensive with Legislative duty, for duty is forever coupled with power. Whatever, therefore, it is the duty of the Legislature to do, it is the duty of the Judiciary to assist in doing. Whatever laws it is the duty of the

* Vattel, ch. 3, § 34.

Legislature to pass, it is the duty of the Courts to interpret and apply, according to the will of the former. Now, our Constitution is new; it has gone through no perils to test and try its strength and capacity for the work it was intended to perform. Should it happen that the powers granted to it by the Government are insufficient to meet a dangerous crisis, what ought the Government to do? Exercise the requisite power and save or try to save the nation, or hold its hand and let the Constitution and the nation perish? Wait until the intricate machinery of the fifth article can be put in operation, whilst the voices of the people, demanding instant action, are thundering through the land, or assume and wield at once all their power, reserved or other, to maintain its authority and defend its flag?

There can be but one answer to these questions, if the Constitution was intended for the people, and if the Government is the representative of the people of 1862, and not of the people of 1787. The Government is a unit; its duty as a whole is to preserve itself and the nation. All the departments ought to act together for this supreme object. There is no such thing as divided duty in a Government. If it be the duty of the Legislature and the Executive to save the country, it is absurd to say that to obstruct their efforts is the duty of the Judiciary. Conflicting powers and duties, discord and collision between the departments, what are they but anarchy within, sure to produce anarchy without, fatal to the Constitution and disastrous to the country?

"This Constitution and the laws made in pursuance thereof, are the Supreme Law of the land." This may be said of the Constitution and the laws of every free Government, as the extract from Vattel, above given, proves. It applies just as well to the English Constitution and laws, as to ours. As before stated, it is evident, from the context of the clause in which it is found, that it was meant to express and enforce the relations between the General Government and the States, peculiar to our system, by giving supremacy to the laws of that Government. These words have been construed to invest the Supreme Court with authority to set aside as invalid, not only

the Constitution and laws of the States, but Acts of Congress, which are inconsistent with the Constitution. Our argument relates to the latter doctrine only, for about the former there can be no dispute. Such is the language of the authorities, and as already said, we bow to authority. It is of great importance, however, at the present moment, to discover what these authorities really decide, and whether they cover the question now before the country; whether it is the right or the duty of the Court, in time of war and attempted revolution, to interfere with the operations of the Government, intended to maintain its power and sanctioned by the majority of the people.

This question has never been presented to the Court, for the circumstances that have given rise to it never before occurred in our history. There never has been an occasion when self-preservation demanded that the Government should overstep its limited powers. There never has been a time when the Government avowedly and intentionally did exceed them because they were found too limited for the emergency. There never has been a time when the Government went beyond the Constitution, and was met on the frontier by an almost universal burst of hearty approbation from the people. The case is a new one. The authorities do not reach it. The question of law, therefore, is open, and must be decided by the general principles of our Constitution, and of all Constitutions.

In all the cases heretofore decided, the violation of the Constitution by Congress has been unintentional. They were, therefore, within the legitimate scope of judicial power. It is the province of the Courts to expound and interpret the laws passed by the Legislature, according to the principles of legal science, and according to the principles of the Constitution. In the absence of clear proof to the contrary, the Court is to presume that Congress does not mean to violate the Constitution. The Judges are "learned in the law." No such learning is, either theoretically or practically, to be predicated of Congress. Therefore, in declaring a law unconstitutional and void, the Court carries into effect what it is bound to as-

sume to be the intention of the Legislature. It merely corrects a mistake, which, it has a right to suppose, the Legislature made through ignorance, and would be willing to have corrected.

Such has been heretofore the history of our Supreme Court, and such the mutual confidence and respect existing between the Legislative and Judicial departments of our Government. Where the Court has spoken, Congress has yielded. This mutual deference is the duty of each. So long as it can be maintained, the action of the Government will be regular and harmonious, for it is the natural action of the two branches of power, each in its appropriate sphere. Its happy results have been the confidence and respect of the people, and cheerful obedience to the decisions of the Court, until recent events have impaired its influence. This misfortune has occurred solely because the Court has departed, or is supposed to have departed, from its legitimate orbit of duty and power, and entered the dangerous and forbidden field of partisan politics. No case has yet occurred where the Legislature has exceeded intentionally its constitutional powers, with honest motives and with the sanction of public opinion. The authorities already referred to do not apply to such a case, and what the Court may rightfully do, and ought to do, when it does occur, is a question of constitutional law yet undecided.

Neither do the elementary writers, to whom we are accustomed to look for guidance, afford us much light on the subject. The Federalist, Chancellor Kent and Judge Story refer exclusively to three classes of cases, to which the conservative and restraining power of the Judiciary is supposed to apply. 1st. Unintentional violations of the Constitution, which we have already considered. 2d. The control of the Supreme Court over the Courts of the States, about which there can be no doubt; and 3d. Criminal usurpation of power by the Executive or Legislature, or a conspiracy by both to destroy the Constitution and overturn the Government. In such a case, the right and duty of the Judiciary is too plain for argument. The Judges surely may refuse to enter into a league against the Constitution, or to become the instruments or allies

of revolutionists and traitors. On the contrary, they may and ought to resist them with all the influence of their office, their social rank, their talents and learning and eloquence. But their resistance would be not that of Judges, but of citizens, and they would use official weight and authority to defend the Government, just as the capitalist would use his money, or the people their fire-arms, or men of mark or eminence whatever weight their position and character gave them.

Let us imagine a case similar to that mentioned by Vattel. Suppose Congress, gained by corruption, or, overcome by intimidation, should decree that a President, supported by the mob or an army, should hold his office for life. This would be not only a violation of the Constitution, but of the common rights of the people, which every man in his sphere would be entitled to resist, and the Courts, as the especial guardians of the law, would be bound to do so, more than others. But let us suppose that such an event should happen in the manner also stated by Vattel. That the necessity for a change in the Executive department had become obvious and had been debated both in and out of Congress, before the people and by the people. That a Presidential election, recurring at short intervals, had been found destructive to order and dangerous to the stability of the Government. That a deliberate and matured public opinion demanded the alteration, although the experiment of making it according to the fifth article was deemed too hazardous, because it would produce the very dangers which the change itself was intended to avoid. Let us suppose the change made. That the people acquiesced. That it worked well; and that after years of peaceful and prosperous establishment, a "case" should arise, which brought the question of constitutionality before the Supreme Court. Imagine a venerable Chief Justice delivering such an opinion as this:

"The right of the plaintiff to recover in the present action arises out of an official act of the Executive. We are asked by the counsel for the defendant to declare that act null and void, because the law of Congress, by which the official term of the President was altered from one of four years to one for

life, was unconstitutional. That law was passed after long and anxious deliberation. The most enlightened opinion, the sober and well-considered judgment of the people had demanded a change, to avoid the constantly recurring perils of a Presidential election, by which, as experience had fully proved, the passions and strife of parties are liable to become so excited as to endanger periodically the public peace and the stability of the Government. The alteration thus made in a part of the Constitution has proved eminently successful. The people have been satisfied, and have prospered under the new law and under the able rule of the illustrious man at the head of the nation. Ten years of tranquil success at home and respect and glory abroad, have justified the action of Congress and the wishes of the people. Ten years have elapsed, and no case until the present has called for the judgment of the Court on this grave subject. We could have wished that no case had arisen, but we cannot shrink from our duty. This Court can look only to the Constitution, and to the intention and meaning of our ancestors in 1787, by whom it was made. It is too clear for argument that Congress exceeded its power by extending the term of the Executive office. The alteration was honestly made, no doubt. It has been eminently successful for ten years, and the people have been satisfied. But neither an act of Congress, nor lapse of time, nor the wishes of the people, unless expressed according to the Fifth Article, nor custom, nor prosperity, nor success, can alter the Constitution, except in the way appointed by itself. The Constitution is the supreme law. This Court is bound by it, and we are therefore constrained by the stern demands of duty reluctantly to declare, that the act of Congress in question was void and of no effect; that the acts of our respected, so-called, Chief Magistrate are also void; that he has no legal power whatever; that, indeed, we have no President or Chief Magistrate at all."

Now what would be thought of such an opinion as this under the supposed circumstances? Would it not cover the Court with contempt? Would it have any influence what-

ever on the President, or Congress, or on the people, unless indeed it might stimulate factious opposition to the Government? Yet it would be law, according to the generally received opinion that the Constitution is a finality, and that the Judiciary is its special guardian, invested with political power to keep the other departments within their prescribed limits.

Such a doctrine must in the end destroy the Judiciary. The people will not bear a political power which is independent of their control. If the Judiciary exercises such power, it must become *representative*, which is the nature of all political power under free institutions. A branch of the Government which can dictate to the Legislature is legislative. It ceases to be a Judiciary, the essence of which is impartiality and freedom from external influence. A branch of the Government which to-day represents the opinions of the dominant party, and to-morrow represents the same opinions when that party has ceased to be dominant, cannot long exist in a democracy. The people will soon demand that it too shall submit to the ballot-box. The duty of the Judiciary is to carry out and apply to private rights the laws made by the Legislature, which *is* the creature of the ballot-box. In this consists the real impartiality of the Courts, for they are thus indifferent to all parties, being indirectly the instrument of any that may happen to rule. But if the judges may control the Legislature, they become at once the opponents of a successful and the organs of a defeated party. The people will say they are no longer judges, but party leaders, and like other party leaders, must become the instruments of the popular will.

The Courts have a nobler and higher part to play than this. They ought to exert the moral influence which springs from character, from talents, from learning, and from a dignified and important station. In any healthy condition of the Government, their opinions must have great weight with the Legislature and with the people, so long as they display qualities which entitle them to respect, and keep within their legitimate sphere. But they cannot depart from that with safety. If they are once drawn within the maelstrom of party

politics, the days of the Judiciary are numbered and the days of the Constitution too.

But we are wandering from the point under discussion. In the case supposed above, or in any case likely to be presented by the present war, might not the Court give some such opinion as this:

"We are asked to set aside an act of Congress, on the ground that it is unconstitutional. It is not a case of doubtful construction from which it can be inferred that Congress were mistaken as to the law, and therefore, that by correcting that mistake, the Court would be carrying out, what it must presume to have been, the paramount intention of the Legislature. If Congress have exceeded their powers in this instance, they have done so deliberately and purposely. Neither is it a case of corrupt and criminal usurpation of power to which the Court might refuse to be a party, and which it would be entitled, like every other officer of Government, to resist. It is conceded that the prescribed limits have been overstepped by Congress, from honest motives, under the pressure of urgent necessity, to save the nation from great and imminent danger, and that the course pursued has received the sanction of the great majority of the people. No such case has heretofore occurred in the history of the country. No such case has been presented to this Court. We must, therefore, in considering it, be guided by those fundamental principles of Government upon which every Constitution is founded, and which, therefore, it is fair to infer, guided our ancestors in constructing ours.

"That every Constitution, made by fallible human beings, must, in time, require alteration to correct its errors and to meet the varying wants and opinions of the people, is a truth of political science, or rather an axiom, which no argument is needed to demonstrate. Our fathers recognized it, and made it the basis of a separate article in the Constitution. It is therein provided that the Constitution may be amended by the people. That it may be amended by persons representing the people. That, when amendments are made, they may be ratified by the consent and approbation of the people. This

was the general purpose intended to be accomplished by the Fifth Article.

"It is a purpose which must not be permitted to fail, for when necessity requires an alteration, it will and must be made, either under and by virtue of the Constitution, or over its ruins. Shall the Government obey this commanding truth of all politics? Shall it carry into effect the obvious and paramount intention of the makers of the Constitution, or shall it disregard that truth and deny fulfilment to that intention, because certain forms of procedure, contrived to realize both, are too intricate and difficult to be followed in practice?

"That is not a just rule for the construction of any law. The end is more important than the means, the substance than the form. If necessary, form and means must be sacrificed to substance and end. So ought it to be, even if the Constitution expressly declared that it could be altered only according to the prescribed forms, which it does not.

"All that those forms were intended to accomplish has been accomplished in the case before us. The Constitution has been altered. It was altered by the representatives of the people, and because a change was needed. The change has been ratified by the people. Shall we sacrifice this valuable substance, for the sake of forms which cannot be observed, and permit those forms, intended for a prudent restraint, to become an insurmountable bar to the action of the people?

"Reason, experience and a just estimate of the condition of the country show clearly that the process appointed by the Fifth Article for altering the Constitution cannot be relied on. It is too cumbersome to meet a sudden emergency, it requires an impossible combination of action and opinion, and its operation would hazard the public peace and the safety of the Government. For these reasons it is improbable that a resort to it will ever be had; it is certain that it cannot be used when it may be most needed. We are then reduced to this alternative: either the Constitution can never be amended, or the Fifth Article must be disregarded. Shall we not say of it, therefore, that if intended to be imperative and exclusive, it was a mistake; that it must become obsolete and expire by

non-user; that it is useless; that what cannot be used has practically no existence, and that we must carry out in some other way the intention of the founders, and the natural law of every Constitution.

"This can be done only by Congress. It is their duty to maintain the authority of the Government, and to provide for the well-being and safety of the nation. If for these purposes it becomes necessary to alter or to transcend the Constitution, it must be assumed that the people intended to invest the Legislature with power to do so. A Government without power to protect itself or the people, is not a Government. It is the duty of Congress to take the responsibility of exerting all the powers of the people for the sake of these paramount objects. If the people are satisfied, no one has a right to complain. The Constitution belongs to them, not to their ancestors. If the people are dissatisfied, they have an effectual remedy in the ballot-box. What it is the duty of Congress to do, it cannot be the duty of this Court to restrain them from doing, even if it had the ability, which it has not.

"This Court is invested by the Constitution with judicial power only. It has never exercised any other. To set aside an act of the Legislature would be, not an exertion of Judicial, but of Legislative authority. Our province is to interpret the laws, not to make them or to repeal them.

"But for the Fifth Article, Congress, like an English Parliament, would be, in a legal sense, omnipotent. The Fifth Article was intended to enforce what is alike the duty of Parliament and of Congress,—reverence for the Constitution, caution in making alterations, respect for the wishes of the people, ultimate obedience to their will. These conditions have all been complied with in the case before us. Substantially, the Fifth Article has been obeyed. Its forms only have been disregarded. Because they have been found useless, they have been treated, for reasons already given, as having no existence. Congress, therefore, like an English Parliament, is omnipotent."

To this complexion we must come at last; and in view of such a logical as well as practical necessity, it is well to con-

sider the position of the Judiciary in the English Constitution. It is worthy of remark, that whilst with us political power is attributed to the Supreme Court, the English Judges have far greater influence than ours over the conduct of the Government. The Lord Chancellor is a member of the Cabinet, and Speaker of the House of Lords. The Chief Justice of the Queen's Bench is a member of the Privy Council, and, with the other Judges, has a seat in the House of Lords. They do not vote. They are there to be consulted on questions of law, and constantly are consulted. The influence, therefore, of the Judiciary is constant and preventive, yet it is strictly judicial. It *advises* the Legislature and Executive on points of law, and is ever present to give advice. It has no power. In our system the Judiciary cannot be consulted, it cannot give advice. It has nothing to do with Congress or with the President, who cannot avail themselves of its knowledge and wisdom, however much they may be needed. It sits apart in "coequal and coordinate" dignity,—truly a separate Department, inactive amid surrounding perils and difficulties. These it must not lend its aid to avoid; but if it act at all, can act only after they have been encountered. It is a silent oracle which can never be consulted until it is too late, and like the stern-lights of a ship throws its radiance, not on the breakers ahead, but on the wake. As already said, it is a matter of accident whether the Courts can ever speak at all, however important the question may be that requires their interference, or they may be enabled to speak only after the question has been long and peaceably settled; for they can gain a voice only by the happening of a "case." In England, when a constitutional question arises,—that is, a question as to the law and custom of Parliament,—it is referred to the "Law Lords." Parliament may thus avoid an unintentional violation of the Constitution.

It follows necessarily, from the doctrine that Parliament is omnipotent, that its laws cannot be annulled by the Courts; for that, Blackstone says, "were to set the Judicial power above that of the Legislature, *which would be subversive of all government.*"* An act of Parliament is the highest authority

* 1 Blackstone's Comm., 91.

that the Kingdom acknowledges on earth. But the Courts will always endeavor to give a reasonable construction to a statute, and will not suppose that the Legislature intended to commit injustice or violate established rights.* Wherever, therefore, the meaning of the law can admit of doubt, it will be construed in favor of those rights. And notwithstanding the logical consequences of the theoretically absolute power of Parliament, the authority of the Courts to declare void acts against common right and reason has been too often asserted, at various periods of English history, to be questioned. "If a statute," said Lord Coke, "be against common right or reason, or repugnant or impossible to be performed, the *Common Law shall control it* and adjudge it to be void; but the Judges will not hold a statute to be void unless it be clearly contrary to natural equity, for they will strain hard rather than hold a statute to be void."† Other eminent judges have approved this opinion;‡ and there can be no doubt that, should a case arise of a criminal usurpation of power or a flagrant violation of the Constitution like that cited above from Vattel, manifestly against the wishes of the people, the Courts would refuse to sanction such an act, and thus become the allies of conspirators and traitors to their country.

It happens, therefore, that unless our Constitution has violated the laws of nature by conferring political power on the Judiciary, and by appointing weakness to control strength; unless it is to be regarded as practically unalterable under the stress of any dangers and necessities, however urgent, and is thus a fetter on the free action and wishes of the people forever, there is no difference between the functions and province of the English Courts and of ours. Both interpret the laws passed by the Legislature, according to the Constitution; both may and ought to resist injustice and criminal designs on the part of the Legislature; and both, when no such iniquity can be imputed to the Legislature, and its meaning is clear,

* 1 Kent's Comm., 419.
† 1 Blackstone's Comm., 91.
‡ 1 Kent's Comm., 420.

must submit to its power and become the instruments of its will. The difference between them is, that whilst our Judiciary is tied hand and foot, until released by a "case," and can never speak at all until a law be passed, the English judges exercise upon the course of Government, a conservative, preventive influence that never sleeps.

This moral influence is the only sort of power over Government which belongs to the Judiciary, or is consistent with its dignity, usefulness, or existence. It is the legitimate sway of learning, of talents, of high character and official rank. Such ascendency the Judges must always possess in the normal and healthy condition of the Government. The opinion of the Court ought to be received with deference by the Legislature, whose duty it is to preserve the Constitution inviolate, whilst it can be preserved. The opinion of the Court will be respected by the people, so long as they are able to appreciate the blessings of free institutions, and so long as the Court keeps within its legitimate sphere. Such has ever been our experience. The judicial power has been exercised by the Supreme Court of the United States with eminent virtue and distinguished ability. Its labors have settled many important questions which necessarily arose under a new system, and it has built up a code of national jurisprudence, which Chancellor Kent justly described as a "solid and magnificent structure," on the broad basis of the Constitution. It has done this through more than half a century of prosperity. It has never passed through times which try men's souls, and try also the virtue and strength of organic laws. It has never had to deal with sedition, privy conspiracy, and rebellion, in battle array against the authority of the Government. The time has come when the true position of the Judiciary must be determined, and it will be determined, not by the language of the Constitution or the construction that has been put upon it, but by natural laws, which every Constitution must obey or perish.

It is easy to see that the formidable rebellion which now disturbs the country cannot be quelled without the exercise of

powers doubted and denied by an influential party. It is true, indeed, that they are not doubtful according to a liberal and enlarged construction of the Constitution, or according to its spirit, and what must have been the intention of those who made it, or according to the best writers on the science of jurisprudence. That a nation is under an obligation to protect itself, and that its government has a right to use all measures necessary for the purpose; that the public safety is the supreme law, and that necessity supersedes all law, are principles of all governments, which if limited in their action by a written Constitution, the limits imposed must be construed to apply to periods of peace and tranquillity.

But this doctrine is denied by those who assert that the Government, being one of enumerated and limited powers, has no authority not expressly granted by the Constitution; that it cannot look outside of that instrument to any source for implied powers; that more especially it cannot do anything which the Constitution expressly forbids; that if the nation cannot be saved according to the forms of the Constitution, it cannot be saved at all; and that it is the right and duty of the Supreme Court to declare null and void every act of Government which exceeds the prescribed limits. The Constitution is thus invoked for the protection of those who are in arms against its authority.

The Government has thought fit, since the commencement of the war, to suspend the writ of Habeas Corpus, to arrest persons suspected of treasonable designs and practices, to exercise a control over the press. There are plans before Congress, which may be carried into effect, for confiscating the property of rebels, even for emancipating the slaves of the South, should the exigencies of the war render so extreme a step expedient. By the party opposed to the Administration all these measures are denounced as unconstitutional. They are so, according to the letter of the law. They are so, if the Constitution be construed to exclude those necessary principles which are the natural and therefore paramount laws of all Governments, and essential to their salvation. Very probably the Courts may also consider these proceedings

unconstitutional, and may undertake to set them aside as void. If void, they are of no binding authority over the people. The people would thus, in the midst of civil war, be released from all obligation to obey the Government.

In the last number of the Federalist, Mr. Hamilton declared that "a nation without a National Government is an *awful* spectacle!" Such was this nation under the old Confederacy. The object of the Constitution was to give it a Government. But a Government divided against itself, with its authority legally resisted by one of its own departments, which thus becomes virtually the ally of rebels, banded against its existence, is no Government at all, for it has no power to protect itself or the nation.

Alterations of the Constitution may be either extensive and sudden, or minute and gradual. The former involve changes of the form and character of the Government, and are not likely to be made in ours, founded, as it is, on correct principles, and well suited to the genius and character of the people. Great changes, such, for example, as that of a republic into a monarchy, if they ever occur, will be brought about by a revolution, unless that can be averted by the machinery of the Fifth Article. But there are other alterations, the result of time and experience, revealing small defects, or made under the influence of transient causes, and which thus become established as precedents. It is highly important that the Constitution may be capable of being thus gently and imperceptibly moulded to suit the wants of the people, and that power to meet every emergency as it arises may be imparted to the Government. Is the Constitution elastic enough for such a purpose, or is it a rigid chain which must be broken because it cannot be stretched? Does the Constitution contain no clauses, from which it may be inferred, that, although the Fifth Article was intended to be used, if possible, for important and organic amendments, yet that others of a less serious character may be made by the Government itself, as experience shows them to be needed?

Alterations of this nature have already been made. They have been accepted by the people, and from the natural tendency of a Constitution to become custom, are now established as law. The Constitution provides that the President shall be chosen by electors, elected by the people. The object was to avoid a direct vote of the people. This object was immediately defeated by the simple expedient of choosing electors pledged to support a particular candidate. The prescribed form has been observed, but it has been made to serve a purpose, the very opposite of that for which it was intended. The Constitution gives to the President the power to nominate, and, by and with the advice and consent of the Senate, appoint all officers of the United States. It was intended, as appears from the contemporary exposition in the Federalist, that he should also remove all officers, by and with the advice and consent of the Senate.* Nevertheless, it was immediately determined by the Legislature, that the President should have the sole and independent power of removal. This construction had the effect of defeating the second clause of Section 6, Article 1, which declares that "no member of Congress shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments thereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office." Offices created, or the emoluments of which are increased during the term, are necessarily few in number. So also are those becoming vacant by death or resignation. But any number of vacancies may be created by removal, and thus Congress may be subjected to the whole force of Executive patronage. No power to acquire foreign territory is expressly granted to the Government by the Constitution, yet, in 1803, Louisiana was purchased, and a tract of country added to the nation, larger than the whole when the Constitution was made.

* Federalist, No. 77.

These were all-important measures. They were all departures from the meaning of the Constitution, and from the intention of its founders. They have given shape, direction and character to the Government, and will control its history. Who can measure the influence which has been, and will be, exerted on the destiny of the nation, by the quadrennial election, directly by the people, of a President who wields the enormous power of Executive patronage as now exerted? Compared with the Executive department intended by the Constitution, is not the office, now, in everything but the name, an elective monarchy? The precedent set by the purchase of Louisiana, was followed by that of Florida; that by annexation of Texas, which led to the Mexican war, and the acquisition of New Mexico and California. With Louisiana we acquired Kansas, and with Kansas, the germ of the present rebellion, which threatens to destroy the Union.

Yet, all these momentous acts were the work of the people, or of Congress with the consent and approbation of the people, given not according to the Fifth Article. What has been done, may be done again, and may be done legally, for in all law, constitutional or other, precedent is authority.

The powers of Government must be coextensive with its objects, and these are so numerous and so much the result of causes which cannot be foreseen, that a Constitution conferring expressly enumerated powers only, is an impossibility. To provide for the future would require a voluminous treatise, and it would be incomplete, unless new volumes were constantly added. General powers only can be granted, general limitations only imposed, and power must be given, expressly or impliedly, to meet those emergencies that time only can disclose. By our Constitution, this has been done expressly. In Section 8, Art. 1, certain enumerated powers are conferred upon Congress; and the list closes by investing them with authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Govern-

ment of the United States, or in any department or officer thereof."

Now, the powers vested in the Government are Legislative, Executive and Judicial, each acting in its appropriate sphere. The accomplishment of the purpose for which the Constitution was made, is the legitimate "carrying into execution" of those powers. That purpose, the Constitution itself declares, was "to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Congress has power, therefore, to pass all laws "necessary and proper," that is to say, expedient and conducive to the attainment of these objects.

These principles are sustained by the best authorities. The Federalist (No. 33), in reference to the clause in the Constitution quoted above, says: "But it may be asked, who is to judge of the necessity and propriety of laws passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer in the second place, that the National Government, like every other, *must judge in the first instance* of the proper exercise of its powers, *and its constituents in the last.* If the Federal Government should overpass the just bound of its authority, and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify."

In this it is implied that should the Government overpass the bounds of its authority, with honest intentions and with the consent and approbation of the people, its conduct would be thus ratified by the only power entitled to call it in question. Thus sanctioned, the act of the Government becomes precedent, becomes law. And what is that law? Simply this, in Hamilton's own words: "The Government must judge, in the first instance, of the proper exercise of its powers, and its constituents of the last." This is the law of England. In No. 34, Mr. Hamilton, discussing the same clause, speaks

thus. "In pursuing the present inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the *probable exigencies of ages* according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a *capacity* to provide for future contingencies as they may happen; and as these are *illimitable* in their nature, it is *impossible* safely to limit that capacity." Evidently this great statesman, who helped to make the Constitution, did not consider it a finality, to be altered only according to the forms of the Fifth Article. Clearly, in his opinion, the clause under discussion, granted to Congress, where those forms cannot be observed, sovereign powers to do whatever circumstances may render necessary, subject only to the subsequent assent of the people. The opinion he expressed in the same work already quoted, in reference to the power of the Supreme Court, must be regarded as modified and limited by these principles.

By the Articles of the old Confederation, the Government was prohibited the exercise of any powers not *expressly* granted. In the Tenth Article of the Amendments to the Constitution, the word expressly is omitted. By this Article, all powers not delegated to the Government are reserved to the people, and coupled with the clause granting general powers, already quoted, the best writers agree that a very large measure of implied power is conferred. All branches of the Government, the Judiciary included, have shown a disposition to increase rather than diminish this power by a liberal construction of the Constitution.*

A great mass of incidental and resulting authority has been exercised by the Government, which has been sanctioned by the Courts and by the people. A national bank, a protective

* Story on the Constitution, ch. 5 and 24; 1 Kent's Comm., 236–248.

tariff, the right to make internal improvements, to acquire foreign territory, to govern it when acquired, to lay an embargo on commerce, to pass alien and sedition laws, and other acts of government, were all denounced as the exercise of authority not expressly granted, and have all passed into the domain of implied power, so far as anything can pass out of doubt into certainty, under our Constitution, a thing impossible, according to the construction given to it by some, who have no small influence over its fate.

The result of these examples and authorities is, that the Government may exercise not only power expressly granted, but all powers not expressly prohibited by the Constitution. But the arguments by which implied power is attributed to Government, sustain also the position that it must have sovereign and absolute power even over the Constitution. This arises, to quote the language of Mr. Madison, in the Federalist (No. 43), from "the absolute necessity of the case; from the great principle of self-preservation; the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions *must be sacrificed.*"

Whenever these great objects are in danger, the Government may, and unless false to its trust, always will overstep the limits of the Constitution to preserve them. What a Government can do, and ought to do, is the law of that Government; the supreme law, to which its Constitution must be made to conform. Moreover, whatever the Government thus does, if afterwards ratified by the sentiments and votes of the people, is, for that reason also, the law, whether the thing done was absolutely essential to the purpose or not, for the question of necessity is one not of law, but of fact.

The people of this country have prospered under the Constitution. They have enjoyed the blessings of security, order, and liberty. They have advanced rapidly in wealth and in all the arts and culture of civilization. They, therefore, justly

regard the Constitution with reverence and affection. It is impossible to over-estimate its value, or to encourage too earnestly those sentiments which may preserve it from the rude touch of experiment or rash innovation. But, that it may endure, it must be capable of alteration, when an alteration is needed, otherwise it will be destroyed; for a Constitution that cannot be changed for the people, and by the people, must, the moment it is felt as an obstruction, be swept away by the force of opinion, and the march of events. Should it yield to these, its original plan and proportions may be preserved, though it may be gradually modified in parts and subordinate details. It may be thus modified, if our reasoning be correct, without violating its spirit, its essential character, or the intention of its founders.

In a war like the present, when all the elements of discord are let loose, when no man can foresee from what source dangers may arise, or what now dormant forces of passion may be roused, the power of Government must be maintained, or every interest of society may perish in a raging sea of violence and anarchy. An excited people in the midst of civil war, without a Government,—who can describe the manifold horrors and miseries of such a condition? Those who are now assailing the Administration for violating the Constitution, and endeavoring to weaken its authority, would do well to think of this. If they can succeed in their schemes, the Constitution for which they profess so much respect, will soon cease to exist, and the war they deprecate, will speedily be brought with added terrors to their own homes.

The Constitution belongs to the people,—to the people of 1862, not to those of 1787. It must and will be modified to suit the wishes of the former, by their representatives in Congress, just as the English Constitution has been modified by Parliament, or it will be destroyed. The great danger to our Constitution arises not from its pliability, but from its rigid resistance to change. It may be thought, by some, that it would run greater risks if committed to the caprice of the multitude, or to such a Legislature as the multitude elects. But these perils must be encountered in a republic. If the

people cannot preserve the Constitution, it must perish, for it cannot be preserved by the Judiciary. The only reliance in a popular Government is on the intelligence of the people, which in our country is so great as to inspire just confidence in the future.

We have not, indeed, an established church, an hereditary throne and a landed aristocracy, elements which have given so much strength and stability to the English Government. But even in England, those resisting forces have exerted far more influence in the past than they do at present. They were powerful when wealth consisted chiefly of land, when knowledge was confined to the clergy, and when Government was alternately threatened by the violence of a rude nobility, and by the rage of the ignorant masses. But the tendency of civilization is to produce equality, both of fortune and intelligence. Commerce and manufactures in England now guard the Constitution as effectually as the land did before, and enlightened public opinion, wielding the sceptre of a free press, wears a crown more mighty than a king's, and overshadows, whilst it protects, a nominal throne.

We have land enough in our country to insure controlling power to its owners, and the conservative influences of land do not depend on the rank or title of those who possess it. Our rapid prosperity has, in the Northern States, accumulated a vast capital in trade, manufactures, and the mechanic arts, in banks, railroads, and canals. We have great cities and flourishing towns. Property exists, not only in masses owned by individuals and corporations, but it is spread abroad throughout society, and with it also is spread the love of material prosperity, of industry and of business, to an extent unexampled in the world or the world's history. All these demand order and stability, and exert a powerful influence in their favor. Knowledge is diffused among the people even more widely than property. It has a free press for its organ and instrument. Opinion rules here as it does in England. Opinion can change the English Constitution, can also secure it from change, and therefore it is safe. On these conditions only can

our Constitution be safe, for opinion, if it cannot change it, will destroy it.

It has become a serious question for the American people, whether they have a Government or not, a question which this war must decide. The essence of Government is that it command obedience. But with a Constitution granting limited powers, which each department, each State, each section, each party may construe as it pleases, which the Judiciary, forgetting its nature, declares to be independent of its own previous decisions, so that all doubtful questions remain forever open, how is it possible that the Government can have adequate authority? Out of these false doctrines grew the alleged right of nullification and of secession; the first which brought the country to the verge of civil war, and the second to the present contest, whose issues are veiled by the curtain of the future. Because of these doctrines also, and of the incompetence of those trusted with power, the Government, long before the war, had ceased to inspire respect or confidence. Authority had departed from it, and it fell so low, that a bold faction, insignificant at first, dared to insult, defy, threaten, and finally to attack it in armed rebellion. Are these causes still to continue their baneful action? The time has come when the question must be settled. Unless the Government can be armed with sufficient power, *legal* as well as physical, to meet all the exigencies of this crisis, neither the Constitution nor the nation can be preserved. A nation without a government is, indeed, as Mr. Hamilton said, an awful spectacle, even in time of peace; but how much more awful in time of war! We are walking over deep waters on ice that is cracking under our feet.

# CHAPTER II.

## UNION.

As already said in the preceding chapter, our Constitution is partly new and partly old. When they set about the task of constructing a Government, our fathers necessarily had in their minds the Government under which they had lived. So much of this as suited their circumstances they took, and could not avoid taking; and in whatever they were obliged to invent they followed the existing model as closely as they could, both from choice and necessity. In every question, therefore, that arises under the Constitution, we should ask, first, What was the English law, what the Colonial law? and secondly, What changes were imposed by new circumstances? We shall thus, in doubtful questions, ascertain what must have been the meaning and intention of the founders, and perhaps also find in the English law, for our guide, principles that have stood the test of time.

It might be thought, from a superficial view of the subject, that if any part of our Constitution was new, it is that which provides for the Union, and establishes its complex relations between the State and General Governments, creating at the same time a Confederacy and a Nation. Yet for this also a pattern existed in the "United Kingdom," and our ancestors adopted the principles by which England, Scotland and Ireland became united. The same pattern existed also in the relation of the Colonies to the Mother Country; and when that relation was severed, first the old Confederacy, and when that failed the present Constitution, was contrived to take the place of the Mother Country.

The image, moreover, of the Union and the States,—that is to say of central and local power,—was presented by the con-

struction of English society and its division into counties managing their own affairs, subject to the power of King or Parliament managing National affairs,—institutions derived from Alfred and our Saxon ancestors, and brought by them, with their blood and free spirit, from German forests. Lord Campbell, in his Lives of the Chief Justices (Vol. I, p. 33), makes some casual remarks, which illustrate the philosophy both of the English Constitution and of ours in relation to this subject. Speaking of the office of Chief Justiciar as introduced by William the Conqueror from Normandy, he says: "The functions of such an officer would have ill-accorded with the notions of our Anglo-Saxon ancestors, who had a great antipathy to centralization, and prided themselves upon enjoying the rights and advantages of self-government. The shires being parcelled into hundreds and other subdivisions, each of these had courts, in which suits both civil and criminal might be commenced." And again, in a note on next page, "It is curious to observe, that notwithstanding the sweeping change of laws and institutions introduced at the Conquest, the characteristic difference between Frenchmen and Englishmen in the management of local affairs still exists, after the lapse of so many centuries; and that whilst with us parish vestries, town councils, and county sessions, are the organs of the petty *Confederated Republics* into which England is parcelled out, in France, whether the form of the Government be nominally monarchical or republican, no one can alter the direction of a road, build a bridge, or open a mine, without the authority of the *Ministre des Ponts et Chaussées*. In Ireland, there being much more Celtic than Anglo-Saxon blood, no self-reliance is felt, and a disposition prevails to throw everything on the Government."

Such are the influences of race; and to these it is due that Norman and Saxon have worked together in harmony to build up a Constitution that suits them both; for though the former came from France to England, both are of the same Teutonic stock which conquered the Celt in France as well as in England, Scotland, and Ireland. Norman and Saxon assimilated and became one people; but they have not assimilated with the

Celt, either in France, in Scotland, or in Ireland, and never will.

Seeing, therefore, that this tendency to unity and diversity, to central and local power, is a quality of race, manifested from the earliest period in English history, it could not fail to show itself in the Constitution of our Government, which else would not have suited the people for whom it was intended. Our ancestors, in obeying a natural impulse, had only to walk in well-worn paths open before them. Let us inquire what those paths were, and whether our fathers kept to them or departed from them.

The British dominions consist, first, of the kingdom, containing England, Wales, Scotland, Ireland, and some adjacent islands, and, secondly, of the colonies and dependencies, such as Canada, the West Indies, India, &c. The first are combined into one Government, by a *legislative* union, each retaining its local laws, customs and jurisdiction, each subject to the general authority, and each possessing a share of influence over that authority. The position of the colonies, or rather of the English race in those colonies, differs from the former chiefly in this, that their union with the parent country is not legislative but dependent. They have their local laws and local government, but they are subject to the power of the English Government, and yet have no voice in its councils, or control over its action. In both, the ruling idea, a combination of central with local power, is completely realized.

The countries which compose the United Kingdom, England, Scotland and Ireland, were conquered by the bold and energetic Saxons, a branch of the great Scandinavian, Teutonic, Indo-Germanic or Arian race, which is supposed, by some writers, to have founded all the great empires that have existed in the world, to have been the authors of civilization and free government, and to be now the only portion of the human family capable of enjoying or maintaining either.*

* Gobineau sur l'Inegalité des Races humain.

Without entering upon this question, it is enough for our present purpose that the British Islands were conquered by the Saxons, who drove the aboriginal inhabitants, the Celts, into the barren and wild land, keeping the fertile for themselves; into the bogs of Ireland, the Highlands of Scotland, the mountains of Wales, much as we have driven the Indians into the wilderness, and ruled over them with despotic power, as we govern the Indians, with small regard for their interests or rights.

After a certain time, another branch of this same Germanic race, the Normans, of a higher and more adventurous spirit than the Saxons, invaded and conquered England. But the conquest was of a very different character from that made by the Saxon of the Celt, as was the nature of the government imposed by the Norman on the conquered country. The Norman encountered the resistance of a people as brave and intelligent as himself, who loved liberty and power as he did, who had the same innate sense of justice, order and right, the same force of mind and character. The two races were of kindred blood, which soon flowed in the same veins, and their instincts led them to adopt the same laws and customs. After some generations, the laws, the customs, and the language of the conquered race gained the ascendency, and, in time, all traces of a different origin, or of the conquest, were obliterated.* The trial by jury came from the Saxon and Magna Charta was obtained by Norman barons from a Norman king.

The natural difference and inequality of race is the guiding clue to much of English history. It explains the combination of local and central power exhibited in its government, also its system of representation, the freedom of its laws, its religious wars, its treatment of conquered countries, the condition of its colonies, and the relations that have existed, and do exist, between the component parts of the Empire.

This history establishes one general truth, pertinent to our

* These points are admirably developed in Thierry's History of the Norman Conquest, and Scott's Ivanhoe, which suggested that work.

topic. Wherever the English go to found a Government, that Government is a copy of the one they left at home. They take with them all the rights and privileges of Englishmen, and all English laws applicable to their condition. They do not impart the benefit of those laws or grant those rights and privileges to people of an inferior race, who are unable to understand, appreciate or enjoy them. They took their laws and rights to America, but did not give them to the Aborigines. They took them to Hindostan, but did not give them to the Indians. They took them to America and the West Indies, but did not give them to the negroes. They took them to Scotland, but did not give them to the Highlanders. They took them to Ireland, but did not give them to the Celts. They kept liberty and law, the trial by jury, and the Habeas Corpus, and the right of suffrage, and, too often, justice and humanity, for themselves, and gave to the conquered the position of a separate and dependent people.

The ruling principle of the English Government, central combined with local authority, springs from the love of liberty and love of power inherent in the Saxon race. Central authority controlling local interests would interfere with self-government. But central authority is necessary in a great and powerful nation. Unless this authority, however, be also subjected to the will of the people, it would be dangerous to liberty. Central power, therefore, for national objects, local power for local objects,—each acting in its sphere, and both obedient to popular opinion,—is the ideal of the English Government. It is the typical form towards which the institutions of all people of English origin tend. It is represented in the relations which England, Scotland and Ireland bear to each other. It is represented in the relation which all the English colonies have borne and still bear to the parent country, and it is represented in the American Union.

Ireland was conquered in 1171, by Henry II, and parcelled out among ten English families and their dependents, the natives being either expelled from their lands, or treated as a subject race. The English laws were introduced only for the benefit of the English settlers.* Partly because of the extent of the domains granted to them, and partly because of troubles in England, which, for a long period, directed from Ireland the attention of the Government, the English chiefs became almost independent. The settlers, also, not being replenished from the parent stock, rapidly degenerated, as always happens from the contact of a superior with an inferior race, where the latter is more numerous. They adopted Irish manners, costume and language. The English authority and influence declined until the time of Henry VII., and was restored by another conquest in the reign of Elizabeth, by which great numbers of English emigrants were introduced, to whom the lands of the conquered natives were allotted.† By these means the Anglo-Irish became a large portion of the population, and the island an important part of the English dominions.

True to their nature, the people, that is to say, the "Englishry," demanded a control over their local interests, and in the reign of James I obtained a Parliament, whose acts were subject to revision by that of England, and Ireland became a dependent kingdom. Thenceforth Ireland was involved in the party contests of England, the native population always siding with that party which promised them relief from the English yoke. The bitterness of religious sectarianism became connected with and inflamed the hostility of race and the hatred inspired by conquest and oppression. In the long contest between Protestant and Papist, the people were, at the same time, persecuted as Catholics and oppressed as Irishmen. Macaulay thus describes the relative positions of the two classes:

* 3 Hallam's Constitutional History, 465; 5 Bancroft's History of United States, 73.

† 1 Macaulay's England, 60.

"The same line of demarcation which separated religion, separated races; and the Irish were of the conquered, the subjugated and the degraded race. On the same soil dwelt two populations, locally intermixed, morally and politically sundered. The difference of religion was by no means the only difference, and was perhaps not the chief difference that existed between them. They sprang from different stocks. They spoke different languages. They had different national characters, as strongly marked as any two national characters in Europe. They were in widely different states of civilization. There could, therefore, be little sympathy between them; and centuries of calamities and wrongs had generated a strong antipathy. . . . The appellation of Irish was then given exclusively to the Celts, and to those families who though not of Celtic origin, had, in the course of ages, degenerated into Celtic manners. These people, somewhat under a million, had, with few exceptions, adhered to the Church of Rome. Among them resided about two hundred thousand colonists, proud of their Saxon blood, and of their Protestant faith. The great preponderance of numbers on one side, was more than compensated by a great superiority of intelligence, vigor and organization on the other. The English settlers seem to have been in knowledge, energy and perseverance, rather above than below the average level of the population of the mother country. The aboriginal peasantry, on the contrary, were in almost a savage state. They never worked till they felt the sting of hunger. They were content with accommodations inferior to that which in happier countries was provided for domestic cattle. . . . Even within a few miles of Dublin, on a soil the richest and most verdant in the world, the traveller saw with disgust the miserable burrows out of which squalid and half-naked barbarians stared wildly at him as he passed."*

This was in 1680, and travellers ever since, up to the present time, have described similar scenes; for though the wealth and civilization of Ireland have advanced with that of Eng-

* 2 Macaulay's England, 118.

land, it has really been the wealth and civilization of the English in Ireland. Ignorance and poverty have still been the characteristics and the fate of the Celt. He remains unaltered through the centuries.

With such discordant elements within, acted upon by so many disturbing causes without, the history of Ireland is a tissue of rebellions and factions, of bloodshed, crime and misery. The island has been the plague and curse of the English Government at every period, always ready to resist its authority and to join its enemies. These troubles arose partly from the turbulent spirit of the Anglo-Irish, and partly from the undying hatred of the subject race, which could be neither tamed, civilized, appeased or amalgamated with the superior. At length the remedy for these disorders, which had successfully been employed in Scotland, was applied. Instead of a dependent kingdom with a separate Legislature, Ireland, by the Union of 1801, became incorporated into England, with a share of representation in the English Parliament. At the same time, local authority over local interests was secured to the Irish people.

It was the opinion and wants of the English race in Ireland, not of the Celtic, which demanded this arrangement, and for whose benefit it was made. The Union was opposed by the native population as adding new chains to their servitude, and by not a few of the English also, as a merger of the dignity and independence of their country into the superior power and grandeur of England. It was advocated, because it secured for Ireland "equality of interests, equality of privileges, and unity of power," with the stronger nation. It satisfied, at once, the love of centralization and of local government. It has been a benefit to both races, and if not to both equally, that is to be attributed to the inherent differences which divide them. Ireland did not cease because of the Union to be a source of trouble to England, both in peace and in war, though far less so than before. Ireland is so close to England, that it must be held either in subjection or in union. The former was found to be dangerous, the latter is not entirely safe. The Celtic population does not love England or

the dominion of England over them. They are always ready for revolt, always ready to welcome a French army on their shores. A union, to be quite safe, must be one of feeling as well as of power, not such

"As creates
Divided hearts, united states,"

and such, to some extent, must ever be that which seeks to combine two different races in one political community.

The English Government, however, has done much to soften the animosities of race and inferiority, by more just and humane maxims and measures than formerly prevailed, in its treatment of Ireland. But far more has been done to promote peace and order, by the immense emigration of the Celtic race to our shores, their place having been rapidly supplied by English settlers. The Irish have built our railroads, have dug our canals, have helped to clear and plough and plant the wilderness, have added immensely to our material wealth, and are now fighting bravely in our armies, but they have introduced the element of a different race into our country, and whether this relief to England be also a benefit to us, may well be doubted.

The union between England and Ireland afforded no light to our ancestors in making the Constitution, since it took place in 1801. It is noticed here, partly to show the nature of what may be called the English Confederacy, and partly,—as will be explained further on,—because it affords an example of the dangers and difficulties, alike of union and of disunion, when two countries lie side by side, and the people of one of them are of a different and inferior race, existing in such numbers as to give them powerful influence over the character, the interests, the manners, the opinions and the destiny of the superior. Neither separation, nor union, nor conquest, nor subjugation, nor oppression, nor cruelty, nor almost extermination, nor justice, nor kindness,—for all have been tried,—have been able to make of Ireland anything but a pest and nuisance to England, a constant source of difficulty and danger, a moral, social and political curse. Gladly would the

English Government and people have got rid of it, if they could, as Carlyle says, "send it off some three thousand miles from their coast." One thing only has succeeded, and that is colonization,—a plan, by the way, which Carlyle himself recommended, but which has been executed, not by the English Government, but by causes beyond its control. The colonization was voluntary. The whole power of England could not have effected it by force.

The last rising of the native race against the English was stimulated by the French Revolution, which inspired them with wild hopes of freedom. Again, the Celt expected succor from France, again the Saxon triumphed by his knowledge and his skill, backed by the power of England. Soon after this the union followed, and then the enlightened spirit of the age demanded for the Irish,—that is to say, for the Celt,—the benefits of the free Constitution of England. This, too, was at length accorded. But, as Macaulay says, "this late triumph of reason and humanity was immediately followed by disappointment; it proved far less easy to eradicate evil passions than to repeal evil laws, and long after every trace of religious and national animosity had been obliterated from the statute-book, national and religious animosities continued to rankle in the bosom of millions." He concludes with expressing a hope that "wisdom, justice and time," may gradually do in Ireland, what they have done in Scotland, and that all the races of the British Isles may be "indissolubly blended into one people."* This hope can never be realized till the numbers of the Celtic race become too few to excite alarm or distrust, and then the inhabitants of the British Isles will be regarded as one people, only because the element that refuses to blend with them, will, like the Celts in Wales and in the Highlands, be too small to be taken into the account.

The union with Scotland, which was made in 1707, was the model of the union with Ireland. There is little difference

* 4 Macaulay's England, 118.

between their terms. Their ruling principle is, a central power, over which the people of both countries have control by means of a legislature representing each, combined with local powers for local affairs.

Before the union, both Ireland and Scotland were subjected to the English Crown, but not to the English Parliament. They had Parliaments of their own, and the authority of the English monarch was exercised, not upon the people directly, but indirectly through these local Parliaments. The relation which each of these two States bore to England was widely different. Ireland was a conquered country colonized by England, the colonies holding a greatly superior number of the native race in subjection, and therefore from the first, dependent on England for aid and governed by its laws. Scotland, on the contrary, until the feudal union of the two Crowns in 1603, under James I, was an independent nation. It had resisted every attempt by England to conquer it, and its resistance formed the most glorious part of its annals. The reason was that its people were of the same Teutonic stock as those of England.

"The population of Scotland, with the exception of the Celtic tribes thinly scattered over the Hebrides and the mountainous parts of the northern shires, was of the same blood with the population of England, and spoke a tongue which did not differ from the purest English, more than the dialects of Somersetshire and Lancashire from each other. In Ireland on the contrary, the population, with the exception of the small English colony near the coast, was Celtic, and still kept the Celtic speech and manners."*

The aboriginal people of Scotland, as of all the British Isles, was Celtic. Two centuries before the Christian era, Scotland was invaded and conquered by the Picts, a tribe of the Gothic race, who occupied the more fertile lands of the south, driving the Celts to the hills or highlands, where they were afterwards reinforced by the emigration of their brethren from

* 1 Macaulay's England, 61.

Ireland, and in their turn conquered the Picts.* These Goths were the Caledonians, who so long and bravely resisted the Roman power, which others of their blood were destined afterwards to overturn in Italy. They were described by Tacitus as of German origin, indicated by their stature, ruddy hair and fair complexion.†

Scotland was afterwards invaded by the Norwegians, who continued their incursions till 1263, subdued both Pict and Celt, and established the ascendency of the Germanic race. These people maintained their independence against all the efforts of England to subdue them. They, too, were of Teutonic blood. Whilst the English colonists in Ireland, wholly dependent on England, were governed by the English Crown, whose previous assent was necessary to all laws passed by their own Parliament, Scotland, on becoming part of the British monarchy, retained her own Constitution and laws. She gave a king instead of receiving one, and her tribunals and Parliament were entirely distinct and independent of those of England.‡

This union, however, proved insufficient either for government or peace. The authority of the Crown was great enough to irritate, but not enough for real government. Differences of religion, the animosities created by centuries of war, the many causes of quarrel necessarily arising between bordering nations and the revolutions that occurred in England, proved sources of constant dissension. The parties that divided England divided Scotland also. She was conquered by Cromwell, she was conquered again by William III, or rather the Jacobite party was conquered, and at length to put an end to quarrels that seemed otherwise interminable, and to secure a more perfect union than was afforded by having one branch only of the government in common and all others separate, a compact was made in 1707, by which for general purposes all branches of the Government should be the same for both nations; the same

* 2 Buckle's History of Civilization in England, 129.

† Life of Agricola, § XI.

‡ 1 Macaulay's England, 62.

Executive and the same Legislature, in which latter, each should be fairly represented. "Equality of interests, equality of rights and unity of power," were thus secured, as in the case of Ireland; local laws and customs were respected, but with these central authority was established. As happened in Ireland, the union was fiercely opposed by the majority of the Scotch people. But time soon disclosed its benefits. It has proved a great blessing to both countries, whose people, being of kindred race, needed only the removal of barriers of separation to make them one nation.

Now what were the terms, and what was the law of this union, which must have been before the minds of our fathers before they made the Constitution; a union that was brought about by the same necessity that produced ours, but which had much more formidable obstacles to encounter. By the articles agreed upon the two kingdoms are united into one, by the name of Great Britain; the succession to the crown is to be the same as before settled, with regard to England; the United Kingdom *shall be represented by one Parliament;* there shall be a communication of all rights and privileges between the subjects of both kingdoms; the standards of coin, weights and measures shall be reduced to those of England, throughout the United Kingdoms; the laws relating to trade, customs and the excise, shall be the same in Scotland as in England. But all other laws of Scotland shall remain in force, though alterable by the *Parliament of Great Britain.* "Yet with this caution, that laws relating to public policy are alterable at the discretion of the Parliament; laws relating to private rights are not to be altered but for the evident advantage of the people of Scotland."*

This was the Act of Union, and these its chief articles, and they embody the principles upon which our Union was founded. A new nation with a new name is created by both. In each the people are represented in the same Legislature. The

* 1 Blackstone's Comm., 96.

powers of Parliament were already well defined, and it was only necessary to add, that the standard of coin, weights and measures should be uniform, and the laws relating to trade, customs and excise the same in both countries, which is also done in our Constitution. A common enjoyment of all rights and privileges by the people of both nations in each, is provided by the English act, and for the people of the States, in Article 4, sect. 2, of our Constitution. All the restraints imposed on our States are implied by the supremacy of Parliament and the prerogatives of the Crown. The principle of central, combined with local power is expressed in the last clauses of the above extract, which declare that the laws of Scotland shall remain in force, though they may be altered by the Parliament representing both nations. No such power is expressly given to Congress over the laws of the States, and the independence of local authority in our system is also more amply provided for by the separate governments of the States, comprising executive, legislative and judicial authority, which continued after the Union, but did not continue either in Scotland or Ireland after their union with England. The great extent of our country, even in 1787, would have rendered it inconvenient or impossible for the General Government to legislate for the different States, and so strong was the feeling of local attachment and the love of local power, that the people would not have consented to give up their separate State sovereignties which they had enjoyed as colonies.

The people, both of Ireland and Scotland, were also averse to do this, and had the Union depended upon their votes, it would never have been made. But their Governments were not democracies. The people were not consulted. The Legislature of each country was influenced partly by the obvious expediency of the measure, and partly by the power and arts of the English Government, by corruption and intimidation. On each occasion it was necessary to deal only with one State. In our case, the consent of nine States, to be given by a popular vote in each, was necessary to ratify the Constitution, and to create, at the same time, a Union and a Government. The consent of these nine States was obtained with great difficulty.

It was obtained under the pressure of obvious necessity, by the influence of the great names that had become famous during the war, and not by any just appreciation by the people either of the merits of the Constitution or the advantages of the Union.* Two States refused for a long time to accede to the plan, and did so at length only because they would have been too weak to stand alone.

The spirit of State sovereignty was further manifested by the Tenth Article of the Amendments to the Constitution, which declares that "the powers not delegated to the United States by the Constitution, *nor prohibited by it to the States, are reserved to the States respectively*, or to the people." All this is implied by the terms already quoted of the Act of Union between England and Scotland; but that act, whilst defining the duty, asserts the supremacy of Parliament.

We see, therefore, that the British Union is more complete than ours, and the three Nations have been made more effectually one than the States under our Constitution; because in the former the central power is stronger and the local power weaker. What, then, is the English law of Union? It is thus stated by Blackstone: "The two Kingdoms are now so inseparably united that nothing can ever disunite them again, except the *mutual consent of both* or the *successful* resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be *fundamental and essential conditions of the Union*."†

Two modes of dissolving the English Union are here pointed out,—one legal, the other revolutionary. It may be destroyed by mutual consent of the parties,—that is to say, by an act of Parliament in which both are represented,—for neither of them has any other mode of expressing its assent,—or by *successful* forcible resistance. The latter method is the exercise of a right which cannot be provided for by any Constitution, for it is paramount to all law,—the right of self-defence against

* 2 Marshall's Washington, 127.

† 1 Blackstone's Comm., 98.

manifest injustice and oppression. It is a right no law can establish without declaring, at the same time, that its own authority may be set at defiance,—which would be suicidal and inconsistent with the idea of law or government. It is a right, moreover, which cannot be settled by any Constitution or statute, because the circumstances under which it may arise cannot, from their nature, be defined.

It is clear that Blackstone did not intend to speak of resistance as a legal right, but only as a way in which the Union might be broken in fact, for he speaks of *successful* resistance,—that is to say, resistance opposed by the Government. Resistance may be morally justifiable, though defeated; and the legal right to dissolve the Union because its terms had been violated cannot be contingent on the chances of a physical contest. So, also, if the Government may oppose resistance, it may subdue it, and thus preserve the Union against the wishes of one party; though, if resistance or rebellion cannot be subdued, it becomes revolution,—in which case the Union would be severed in fact, and, when the separated part was recognized by the Government, would be severed in law.

The right and the duty of Government, and the possibility of disunion as a practical result of an abuse of power, are stated in a note on the same page, explanatory of the text quoted above. "It may justly be doubted whether such an infringement" (of the fundamental conditions of the Union), "though a manifest breach of good faith, *unless done on the most pressing necessity*, would of itself dissolve the Union; for the *bare idea of a State, without a power somewhere vested to alter every part of its laws, is the height of political absurdity.* The truth seems to be, that in such an *incorporate Union* (which is well distinguished by a learned prelate from a *Federate alliance*, where such an infringement would certainly rescind the compact), the two contracting States are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals,

and therefore it is hinted above, that such an attempt might endanger, though by no means *destroy* the Union."

The English law then is clear enough. By the several acts uniting England with Scotland and Ireland, the separate existence of each became merged into that of a new nation, called thenceforward "The Kingdom of Great Britain and Ireland," and governed by a Legislature representing the whole, which Legislature is supreme. It is still the English Parliament, with its attribute of omnipotence. It has power as before over the whole nation, and all its parts, to maintain the Union, or to dissolve it. A separation must be the work of Parliament, not of Ireland or of Scotland. It may be granted to the wishes of either, or it may be refused, according to the pleasure of Parliament. So much Blackstone says, and so much may be inferred, from the fact of the legislative union of the three kingdoms, and the accepted doctrine that Parliament is omnipotent.

But another inference from both may also be drawn, which is, that Parliament has legal power to dismember the nation by withdrawing from any portion of it the authority and protection of the Government, and excluding such portion from its rights and privileges under the Union. An act of this sort might be oppressive and a violation of good faith, or necessary and just, according to circumstances. It might be the result of an unsuccessful war, in which the cession of territory was exacted by a victorious enemy, as the only condition of peace, or it might be demanded by a majority of the nation as essential to their interests, their safety or their tranquillity. It is a supposable case, that either Ireland or Scotland might become disaffected to the Government, and that Parliament would prefer to get rid of either, rather than hold it in subjection by force. It is supposable that the Celtic race might become dominant in Ireland, that by their turbulence, their ignorance and their pauperism, the English should be driven out of the island or be reduced to the level of the Celt, and that the English people would refuse to live on equal terms, or any terms, with a country which could not participate in their civilization or liberty, or share their destiny. In these

and other cases that may be imagined and may happen, there can be no doubt of the legal power of Parliament to sever the union, for Parliament has sovereign power over the nation.

Such, then, is the English law of the Union of the British Empire. Parliament has sovereign power, either to maintain it or to break it, and over that question no one of the *component parts has any power whatever.* This, indeed, is only another way of saying that Great Britain is a nation and has a Government; for every Government must have supreme control over all its domain. If it be asked what security the people of Ireland and Scotland have against oppression, against the violation of the terms of the original compact, or against the arbitrary sundering of the Union, the answer is, that they have all the security which the case admits. They have the security afforded by the votes and influence of Scotch and Irish members of Parliament, by the benefits which the Union has conferred on the whole nation, by an enlightened and vigilant public opinion, by the control exercised by that opinion over Parliament, through the elections and by the character of the Government itself, its intelligence, honor, public spirit and sense of duty. No constitutional provisions can afford safeguards equal to these. Should these fail, any other must prove ineffectual. They have not failed during an experience of a hundred and fifty years in the case of Scotland, and of sixty years in the case of Ireland. By the contract of union, the contracting parties ceased to exist. That they should do so was the very object of the contract. A new nation and a new Government were created, a Government necessarily without a legal superior, and invested with all the powers of the three, before independent. This Government has no internal checks, nor can have. All control over it must be external, such as above described, and should these fail, the ultimate remedy for injustice remains,—the natural right of resistance, an extreme remedy for extreme ills, to be resorted to only when all redress by other means is hopeless.

Such is the English law of Union. It arose out of necessity imposed by circumstances. Three nations, close neighbors, inhabited by different races, were engaged in con-

stant and inevitable wars. By conquest and by the accident of hereditary succession to the Crown, the three became partially united. Partial separation, nevertheless, was sufficient to maintain the old discord. Fierce and cruel wars, checking the progress of civilization in each country, and devastating with fire and sword the weaker, continued through many centuries. At length, some wise men thought of uniting the three nations under one Government, as they were already united under one Crown. They were separated from the rest of the world by a sea, then not so easily passed as it is now. If they could be at peace with each other and form one people, their combined power might secure them from foreign attacks, whilst tranquil and safe at home, their genius and industry would insure rapid progress in wealth and refinement.

For the sake of these advantages, the three nations agreed to annihilate their separate existence and become one nation, living under one Government. It is clear that their new condition made it necessary that a power be lodged somewhere to maintain the Union, should it prove beneficial, and to dissolve it, if found productive of more evil than good. Only in the Government that represented the whole could this power be placed. To grant it to each of the parts would have given to a part power over the whole, would have continued the separate existence of each, and would have created not a Union, but an alliance,—the very thing the Act of Union meant to avoid.

We have shown that our Constitution is very similar to the Act of Union between England, Scotland and Ireland, so far as it relates to the great principles of central and local power. But Scotland and Ireland are parts only of the British Confederacy, of which our ancestors were members. What was the *Law of Union* between Great Britain and her Colonies? Whatever it was, it must have served as a guide or a warning, or as both, to those who made our Constitution, and may, perhaps, enable us to find out their meaning, or what

is still more important, to establish, on safe and just foundations, the law of to-day.

As already stated, the idea of union was no novelty to the American people before the War of Independence. The Colonists were already united, not only by similarity of race, language, laws, literature and history, but they were united under one general, central government. They were fellow-subjects of the British Crown, and entitled to all the rights and privileges of Englishmen,—among them, to the privilege of self-government and the right of granting or refusing their assent, by their representatives, to laws which taxed their property or controlled their personal or local interests. For the purposes of local government, each colony had its own Legislature and its own Courts. They all formed a part of the British Empire, were entitled to its protection and governed by its laws, in things that related to the government of all.

In these respects the position of the Colonies was similar to that of Ireland, which was a distinct dominion and had its own Parliament, so that no acts of the English Parliament extended into it, unless it was specially named. Its right of self-government was recognized as early as the reign of Henry VI and Richard III, when it was declared that "a tax granted by the Parliament of England shall not bind those of Ireland, because they are not *summoned to our Parliament.*" And again: "Ireland hath a Parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send knights to our Parliament."*

The violation of these ancient privileges produced the American Revolution. With what affection the Colonies clung to the mother country, how much they endured, how long they remonstrated and entreated, with what reluctance the idea of resistance or independence was admitted, are well known. Nothing short of gross injustice and persistent outrage to the ruling sentiment of their race, the love of self-government, could have weakened or destroyed their loyalty.

* 1 Blackstone's Comm., 101.

"In America," said Samuel Elliot, of Boston, in 1767, "the people glory in the name and only desire to enjoy the liberties of Englishmen. There is not the least foundation for the suspicion that they aim at independence. If we have no forces or new stamp act, I would almost answer for them. Our warmest patriots speak of our connection with Great Britain as a felicity; and to have it broken, as one of the greatest misfortunes that could befall us."* And again, in 1774, after the tea had been thrown into Boston harbor, and the mutterings of war were heard in the approaching future, when Franklin was departing to make a last effort at reconciliation, his instructions contained these words:

"The old good-will and affection of the people for the parent country are not totally lost; if she returns to her former moderation and good humor, their affection will revive. They wish for nothing more than a permanent union with her on the condition of equal liberty. This is all they have been contending for, and nothing short of this will or ought to satisfy them."†

But England would not be entreated. Her Government determined to assert the supremacy of Parliament, and could think of no better way to do this than by measures which violated well-established constitutional principles and rights long enjoyed. It was the oppressive use of power that the Americans resisted. The theoretical "omnipotence" of Parliament could not be denied. It was not really denied in America; it was never doubted by the friends of America in England. No one could pretend that an act of Parliament was *legally void*, though unconstitutional,—that is to say, a departure from established custom, and though its tyrannical character might justify resistance.

The Americans contended for an idea, the right to tax themselves, the right of local legislation, a right which belonged to them as Englishmen. They had borne heavy burdens on their industry, vexatious fetters on their enterprise and commerce,

* 6 Bancroft's History, 73.

† 6 Bancroft's History, 509.

in the shape of navigation acts, duties and restrictions imposed for the benefit of England, without murmuring. But to lay a direct tax upon them, like that of the stamp act, without the consent of their own representatives, violated their rights and their instinctive love of self-government. They resisted it. Had they been French colonists, they would not have resisted. The French colonies are governed in all their interests by the central power at Paris, without a murmur of discontent. "If taxes are laid upon us," said Boston in 1764, "without our having a *legal representation where they are laid*, are we not reduced from the character of free subjects, to the miserable condition of tributary slaves? This annihilates our charter right to govern and tax ourselves. We claim British rights, not by charter only; we were born to them."* To the same effect is the protest of the Assembly of Massachusetts. "Can it be possible that duties and taxes shall be assessed without the voice or consent of an American Parliament? If we are not represented we are slaves. Ireland was a conquered country, yet no duties were levied in Ireland by the British Parliament."† Patrick Henry maintained that "the inhabitants of Virginia inherited from the first settlers of that dominion equal franchises with the people of Great Britain; that taxation by their representatives was the distinguishing characteristic of British freedom and the Constitution." "We have the rights of Englishmen," was the common voice, "and as such we are to be ruled by laws of our own making, and tried by men of our own condition."

By the joint influence of the rising discontent of the colonists, and the eloquent arguments of their friends and advocates in Parliament, the Stamp Act was repealed, though the purpose of raising revenue in America by internal taxation was not relinquished. This had been done before by external regulations of commerce and restrictions upon trade and manufactures, to which the colonists had long submitted. They, however, made bold by success, by consciousness of grow-

* Bancroft's History of United States, 197.

† Ibid., 199–286.

ing strength, by union, and their views enlarged by the discussions which had been elicited, discovered that in principle there was no difference between being burdened by external duties, levied without their consent in England, and by internal taxes collected in America, though the former had been long borne without complaint. When asked by the House of Commons, in 1766, to point out the difference between them, Franklin could only mention a practical difference: "The people may refuse commodities of which the duty makes a part of the price, but an internal tax is forced from them without their consent."

When asked whether Parliament's right of external taxation might not also be objected to, he replied that it had never been hitherto. "Many arguments have been made here, lately, to show that there is no difference, and that if you have no right to tax them internally you have none to tax them externally, or make *any other law to bind them.* At present they do not reason so, but in time they may be convinced by these arguments."*

They were convinced by them and by the oppressive measures of the English Government, and the result at length was a Declaration of Independence and war. It is to be observed that war and consequent separation might have been avoided by the expedient which had before made peace between England and Scotland, and afterwards between England and Ireland,—a Legislative Union. Had the Colonies been allowed to send representatives to the English Parliament, the principles so zealously maintained by America would have been satisfied. This plan was frequently suggested and discussed during the long controversy, but was not pressed by the colonists on the ground that it was impracticable, and was rejected by Parliament for the alleged and absurd reason that they were already virtually represented. An able and very influential pamphlet of the day (1765) thus stated the point: "It is not the tax, it is the unconstitutional manner of imposing it, that is the great object of uneasiness to the Colonies. The Minister

* 5 Bancroft's History of United States, 432.

admitted in Parliament that they had in the fullest sense the right to be taxed only by their own consent, given by their representatives, and grounds his pretence of the right to tax them entirely upon this,—that they were virtually represented in Parliament."*

The claim, as a mere naked right, had a better foundation. It was an incident of the right of the British Government to retain the Colonies as part and parcel of the British Empire. The expense of governing and of protecting them was paid by England. The external taxes had proved inadequate for the purpose. Since the time of William the Third it had been a maxim that America, like Ireland, should bear in whole or in part the cost of its military establishment. But how to compel America to contribute to this expense, was the question. The practice long had been to send Executive orders or requisitions; but these were liable to be debated in twenty Colonial Legislatures, might therefore be delayed or refused, and often were refused. A necessity was felt for *some central power, or for Union.* The King had no power to demand revenue from America and raise it by coercive measures. Parliament alone could do this, and resort was had to the power of Parliament. "When New York failed to make appropriations for the civil service, a bill was prepared, to be laid before Parliament, giving the usual revenue. . . . It was settled then that there must be a military establishment in America of twenty regiments; that after the first year its expenses must be defrayed by America; that the American Colonies themselves would never agree to vote such a revenue, and that Parliament must do it."†

For this purpose the power of Parliament must of necessity be supreme, as it must for any other act essential to maintaining the relation of the Colonies to the mother country, for otherwise they would be independent. A case might happen in which the exercise of such power would be justifiable, and it is to meet such cases that the power exists. An act of Parliament taxing the Colonies against their consent was uncon-

* 5 Bancroft's History of United States, 281.

† 5 Bancroft's History of United States, 154.

stitutional, but it was not void. It might violate precedent, laws and established rights, and yet do this wisely, reasonably, and of necessity. Therefore no act of Parliament can be void, for there must be supreme power to answer a supreme need.

But an act of Parliament may be unjust and oppressive, and may thus call forth the natural right of resistance, which, because it is superior to all laws and constitutions, cannot be provided for in any. Of this nature was the attempt to tax America. It violated ancient rights, and violated them unnecessarily. It disregarded the ruling sentiment of a loyal people, and exacted slavish submission to arbitrary will, instead of free obedience to equal laws. This might suit Frenchmen in French colonies, and thus were French colonies governed, but it did not suit the genius of the Saxon race, who cannot live under any laws which they do not themselves make. The case presented all the conditions necessary to justify resistance, and to call into being the "right of revolution." The grievance was real. The material interests involved, whether great or small, formed no part of it. It was a burden on the soul; it was an attack on the moral life of the people, of which liberty was the essential element. There was no hope of redress by legal means, but there was hope of redress by resistance, as the event proved. All legal means, arguments, petition, remonstrance, humble entreaty, through long years, were tried in vain. Slowly and sorrowfully at length, but steadfastly and solemnly, our ancestors took the position which, through other long years of heroic war, they successfully maintained. They determined to become a nation, a new nation of Englishmen, and to found a Government which should embody and preserve forever that noble liberty which they had inherited from a glorious past.

The genius of Burke, the brightest star in the constellation of English statesmen of the day and the only one who could think philosophically, and therefore prophetically, grasped the case in all its bearings, its causes, and its consequences. In his speech on American taxation, delivered in the House of Commons April 19, 1774, with eloquence which glows even through the imperfect report of it, he vindicated the rights,

depicted the wrongs, and foretold the future of America, whilst he, at the same time, expounded the law which rules the subject, with clearness and unanswerable truth. "Again, and again," he says, "revert to your old principles,—seek peace and insure it. Leave America if she has taxable matter in her to tax herself. I am not here going into the distinctions of rights or attempting to mark their boundaries. I do not enter into these metaphysical distinctions. I hate the very sound of them. Leave the Americans as they anciently stood, and these distinctions, born of an unhappy contest, will die along with it. They and we, and their and our ancestors, have been happy under that system. Be content to bind the Americans by laws of trade; you have always done it. Let this be your reason for binding their trade. Do not burden them by taxes; you were not used to do so from the beginning. Let this be your reason for not taxing. These are the arguments of States and Kingdoms. Leave the rest to the schools; for there only they may be discussed with safety. But if intemperately, unwisely, fatally, you sophisticate and poison the very source of Government by urging subtle deductions and consequences, odious to those you govern, from the *unlimited and illimitable nature of supreme sovereignty*, you will teach them, by those means, to call that sovereignty itself in question. If that sovereignty and their freedom *cannot be reconciled*, which will they take? *They will cast your sovereignty in your face.* Nobody will be argued into slavery. Sir, let the gentlemen on the other side tell me what one character of liberty the Americans have, and what one brand of slavery they are free from, if they are bound in their property and industry, by all the restraints you can imagine on commerce, and, at the same time, made pack-horses for every tax you choose to impose, without the least share in granting them. When they bear the burden of unlimited monopoly, will you bring them to bear the burdens of unlimited revenue too? The *Englishman* in America will feel that this is slavery,—that it is *legal* slavery, will be no compensation to his feelings or his understanding."

In the same speech there is the following striking descrip-

tion of the British Empire and of its relations to the central Government, which is well worth attention, because it states not the law only, but the reasons of the law. When these are known, it is easy to determine whether they be applicable to new circumstances. "I look," said Mr. Burke, "on the imperial rights of Great Britain, and the privileges which the Colonies ought to enjoy under those rights, to be the most reconcilable things in the world. The Parliament of Great Britain sits at the head of her extensive Empire in two capacities: one, as the local Legislature of this island, providing for all things at home, and by no other instrument than the Executive power. The other,—and, I think, her nobler capacity,—is what I call her *imperial* character, in which, as from the Throne of Heaven, she superintends all the several inferior legislatures, and guides and controls all without annihilating any. As all these provincial legislatures are only co-ordinate to each other, they ought all to be subordinate to her, else they can neither preserve mutual peace, nor hope for mutual justice, nor effectually afford mutual assistance. *It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient by the overwhelming plenitude of her power.* She is never to intrude into the place of others whilst they are equal to the common ends of their institutions. But, in order to enable Parliament to answer these ends of provident and beneficent superintendence, *her powers must be boundless.* The gentlemen who think the powers of Parliament limited, may please to talk of requisitions. But suppose the requisitions are not obeyed. What! shall there be no *reserved power in the Empire to supply a deficiency that may weaken, divide and dissipate the whole?* We are engaged in war. The Secretary of State calls on the Colonies to contribute. Some would do it, I think most would furnish cheerfully whatever is demanded. One or two, suppose, hang back and easing themselves, let the stress of the draft lie on the others. Surely it is proper that some authority might legally say, 'Tax yourselves for the common supply, or Parliament will do it for you.' . . . . But then, this ought to be no ordinary power, nor ever used in the first

instance. This is what I meant, when I have said that I consider the power of taxing in Parliament, as *an instrument of umpire* and not as a means of supply."

It is obvious, from this reasoning, that if,—as above shown,—by the law of the union between England, Scotland and Ireland, Parliament has supreme power over that union, to maintain or dissolve it, the power of the parent country over the union of its colonies cannot be questioned. They form a part of the British Empire, and the British Government must, of necessity, have absolute power over them to enforce their obedience, to grant them independence, or to dismiss them to shift for themselves, as justice and expediency may demand. Should Canada, for example, rebel, England would unquestionably have a right to suppress the attempt, by military power. Should Canada formally pray to be allowed to form a separate nation, the privilege could be legally granted, and, probably, would be, if for her benefit,—for she is no longer valuable as a colony,—has become, indeed, rather a burden than a benefit, in peace or in war. But Canada might become worse than useless,—a troublesome and dangerous appendage to the Empire. She might be factious, disaffected, insubordinate. A portion of her people might desire annexation to our States, and thus become a source of expensive war to England. Should these things happen, no one could doubt the legal power of England to get rid of Canada, with or without her consent.

Such is the British Union, whose morning drum-beat, as Mr. Webster said, announcing the sunrise, encircles the earth every day. Such is the Government whose benign sway has carried English liberty, law and literature over the fairest portions of the world. Such was the Government under which our fathers lived and which they revered and loved. Why, then, did they withdraw from it? Its principles supplied local self-government, one necessity of their Saxon nature. They supplied a central power for national strength and protection. Where was the defect? These principles did not

give also a share of control over that central power. Whilst the power was exercised with moderation, the defect was unnoticed, or was borne from habit, from loyal attachment and because of the benefits conferred by the Union. When the power was abused, it was resisted and cast off. The remedy for this defect was a legislative union, which had been successful with Scotland, which was afterwards successful with Ireland, and for want of which America was lost. The grievance complained of was not the burden of taxes, for the colonists had borne heavier burdens, but the principle of taxation without representation. The moment the operation of this principle was perceived by the people, it caused a passionate burst of opposition throughout the Provinces.

It never was perceived and felt until the Stamp Act was passed, which was the first attempt to impose direct taxes. Indirect taxes were *apparently* voluntary, for they were paid in the price of the taxed commodities. The seller, though in reality a tax collector, visited no man's house to demand tribute. To forbear to purchase was to avoid the tax. The commercial regulations and the navigation acts, moreover, as Mr. Burke said, in another part of the speech above quoted, were sanctioned by custom. They began with the infancy and had grown with the growth of the Colonies, which prospered under them, onerous as they were. But direct taxes were not only a novelty, but a novelty which announced in a way not to be misunderstood, a departure from principle, and a violation of well-established constitutional right; the right of being governed, not by a distant, independent power, but by a power representing the people.

Had the British Government abstained from this abuse of power, separation would have been avoided, as it has been in the case of Canada. Had England granted to the colonists, as she did to Scotland and Ireland, the privilege of sending representatives to Parliament, separation would have been avoided, at least for a time. But for many reasons, not necessary now to discuss, this was difficult, if not impracticable, and was acknowledged to be so by the Americans themselves. Yet such representation was the one thing necessary to satisfy the

moral wants of the people, and to secure that freedom which was their birthright, under the ancient laws of their fatherland. Of the want of this they complained, and of that only, and for the sake of this they fought and conquered.

The picture, therefore, given by Mr. Burke, of the British Union, is worthy attentive study. It is a picture, drawn by the hand of a master, of the Government which our ancestors regarded with profound and loyal affection. In their eyes it had but one defect,—it did not provide for their representation in the central power. Is it not fair to suppose, therefore, that when they themselves came to construct a central power, with subordinate dependencies, this old, long-tried, renowned and venerated Government would be taken as their model, except in the part they had found defective, the only part to which they had ever objected?

It was natural that they should do this, and therefore they *must* have done it, and the more we examine this description given by Mr. Burke of the British Union, the more does it look like the American Union, if we add the principle of central representation, omitted in the former. If we look also to the history of both countries after the separation, we shall find that the very same causes which induced England to grant representation to Ireland, the impossibility of governing governments, that is to say, by means of requisitions directed to independent legislatures, instead of by direct action on the people, led our ancestors to create both a confederacy and a nation.

I have thus endeavored to show what is the law of the great British Union, which is both a confederacy and a nation, which law was written in the minds and hearts of our forefathers, when they undertook the difficult and delicate task of forming the American Union. We have seen that by this law both central and local governments are created, and that the central power is vested with supreme authority over the *fact of Union*, to preserve it or *destroy* it, as circumstances require. Let us now ask, what, with this model before them, our ances-

tors actually did in this respect, what was the law they made and also what is the natural organic law of our Union, which law we ourselves must make, if we have it not already, or perish.

Not only was the idea of Union familiar to the minds of our ancestors, because they belonged to the confederacy of the British Empire, but because from the earliest period combined action by means of a Congress of delegates from the Provinces was habitual. This was necessary for defence against the French and Indians, whose attacks involved all in a common danger, and led to the formation of the "United Colonies of New England" in 1643, and to the General Congress of the Colonies at New York in 1690. When the spirit of resistance was roused by the Stamp Act of 1765, Union was an expedient already tried, though then for the first time without the consent of the home Government, but not in opposition to its authority.

Nevertheless, it suggested to thoughtful minds the vision of a future nation. The wrath of the colonists waxed stronger with the persistence of the British Government in its plan of taxation; and as the prospect of a rupture gradually assumed a more and more definite shape, the absolute necessity for Union became apparent. In 1772 the celebrated "Committee of Correspondence" was organized by Samuel Adams, of Boston.* They sent circular letters to the Colonies, urging the importance of combined action for the defence of common liberty and rights. Province called to province. The flames of passion, kindled by the sense of wrong, were fed by confidence in mutual aid. This committee first suggested the idea of Independence and an American nation. An irresistible impulse swayed the people. They felt more than they said, and when they looked at the magnificent country which was theirs, were stirred by thoughts of what might be, but which habits of obedience and loyalty repressed for a time. They were Englishmen, and were moved alike by the love of liberty and the

* 6 Bancroft's History of United States, 429.

love of power. Liberty was theirs by right, and power awaited only the grasp of their rapidly growing strength.

The Continental Congress which met in Philadelphia in 1774 was the result of the zeal and activity of this committee. Not yet, however, was the idea or purpose of resistance openly avowed. The object of the Congress was to obtain redress from England and security for the future, and for these purposes to negotiate with the British Government. Two years were thus spent in fruitless efforts, and then at last followed the decisive step of the Declaration of Independence on the fourth of July, 1776.

War had, however, already commenced. The Continental Congress was not a Government. It was a mere Council of Delegates from the States. But a Government was necessary to carry on the war. This was soon felt, and the result was the Articles of Confederation, debated and agreed to by Congress in 1777, accepted by the *Legislatures of the States*, and ratified by Congress in 1781. The system thus created was formed in the midst of war. It was really nothing more than a Provisional Government, or, more properly speaking, an alliance of separate States, who suddenly found themselves for the first time separate and independent, at a moment when united action was necessary for the common defence. The Confederation had none of the attributes of a Government. As its name implies, it was a league of sovereignties who had never been sovereign before. It had no Legislature, for it could not make laws; it had no Executive, but in its place a committee of one delegate from each State, to act in a very limited sphere during the recess of Congress; it had no Judiciary, for it did not operate on individuals or affect private rights; above all, and for these reasons, it wanted power,—the essential requisite of every Government. It addressed itself, not to persons, but to States, because it represented States, and not the people. It therefore could not command; it could only recommend and request, and had no means to enforce compliance.

Congress could not collect taxes, for this authority was reserved to the States, each of which gave or withheld its quota,

as its Legislature chose. Congress might contract debts, but it depended on the Legislatures of the States whether they should be paid. Even for the purposes of the war, the Government had no power to draft men, or to create an army or a navy: these were furnished by the several States. Congress had no control over the foreign relations of the country. It had no power to regulate commerce or to enforce the observance of treaties.

It soon became obvious that the Confederation was inefficient, even as a Provisional Government, during the war. Its want of power impeded the operations of the army. There was no authority to draw out the resources of the country, for all supplies of men or money were to be granted or withheld by the Legislatures of thirteen different, jealous, often quarrelling States, which even the urgent pressure of common danger could not always urge to harmonious action. These evils were the subject of frequent complaint by Washington. In a circular letter addressed to the Governors of the States he said: "Unless the States will suffer Congress to exercise those prerogatives they are undoubtedly vested with by the Constitution, everything must very rapidly tend to anarchy and confusion. It is indispensable to the happiness of the individual States that there should be lodged somewhere a *supreme* power to regulate and govern the concerns of the Confederated Republic."

The glaring defects of a Government that could not govern had become evident to all, and were universally admitted before the war was over. They are thus summed up by Hamilton in the fifteenth number of the Federalist: "There is scarcely anything that can wound the pride or degrade the character of an independent people, which we do not experience. Are there engagements to which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts contracted in a time of extreme peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in possession of a foreign power, which, by express stipu-

lation, ought long to have been surrendered? These are still retained, to the prejudice of our interests not less than our rights. Are we in a condition to resent or repel the aggression? We have neither troops nor treasury nor Government. . . . To shorten an enumeration of particulars, it may in general be demanded, what indication is there of national disorder, poverty and insignificance, that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our misfortunes?"

Such was the Government under which the American people found themselves when Independence was achieved. They had cast off forever the British central power, and this was the substitute. They no longer formed part of the great British Empire, and they were not themselves a Nation, but a cluster of independent Nations, bound together by a feeble alliance,—the source, not of strength, but of weakness,—not of harmony, but of discord. As Colonies they had been strong and safe, because they were protected by British power, and at peace with each other, because governed by British law. They had withdrawn themselves from the power of England, and the want of it was immediately felt. Local authority they had,—more than enough. But union was essential to their safety and prosperity, and union was proved to be impossible without a central authority strong enough to govern the Union.

During the war the minds of men were too much excited and absorbed by its events to reflect upon their political condition or the causes of it. But when peace was restored, the terrible reality of their situation was revealed. They had fancied themselves a Union, but they discovered that they were a number of Independent States, without cohesive force. They had imagined themselves a Nation, but experience had taught them that such a thing as a Nation without a National Government does not exist in nature. Something must be done,—but what, was the difficult question. The States were jealous of their sovereignty. The people, just escaped from the yoke of England, dreaded a central power, even though they might control it. No one, however, could deny the defects of the Confederation, or the evils that had grown up

under it. The alternative presented was, a stronger Government for the Union or separation, with all its manifold dangers and calamities.

Several abortive attempts were made to assemble conventions to amend the Articles of Confederation, and to grant further powers to Congress. At length the Legislature of Virginia appointed delegates, who were authorized to meet others chosen by the States, to take into consideration the condition of the *trade* of the United States, and to report a uniform system by which it might be regulated for their common interest. These delegates met at Annapolis on the 11th of September, 1786. Only five States were represented. Fortunately a master spirit, a man of genius, was one of this small assembly. Hamilton saw that the task imposed on the statesmen of the country, if they meant to save it, was something very different from the regulation of its trade. The delegates, instead of discussing commercial questions, adopted a report written by him, recommending the appointment of commissioners from all the States, "to meet at Philadelphia in the following year, to take into consideration the situation of the United States, and to devise such other measures as shall appear to them necessary to render the Constitution of the Federal Government *adequate to the exigencies of the Union.*" The proposition was favorably received. Deputies were appointed by all the States except Rhode Island. They met in convention May 14th, 1787, and on the 25th of the same month were organized by the appointment of Washington as their President. The result of their deliberations was our present Constitution.

Thus at length was discovered the only path out of danger. The people had got their wise men together, and invested them with plenary power, to do what no people can do for themselves,—create a government. The Convention sat with closed doors, and we have a very imperfect report of the debates, the art of phonography not then being known. The only authentic contemporary account that exists of the arguments and reasons which governed the Convention in framing the Constitution, is contained in a series of essays written by

Alexander Hamilton, John Jay and James Madison, for the purpose of recommending it to the people. These essays have been collected in a volume, called the Federalist, and are valuable, not only because they expound with great force and clearness the principles of the Constitution, and are authority, both legal and historical, but because they form an admirable treatise on the general principles of government. They are the work of men of fine intellect, who combined the culture of liberal study with the experience of active public life, during a stormy period of revolution and war, when the importance of sound principles is most clearly revealed; who had seen two governments tried and fail, and were, therefore, instructed in what was needed to make another. These essays are replete with wisdom,—any one who reads them now, will say, with prophetic wisdom,—and are written with scholarly clearness and elegance. They are trustworthy witnesses of the past, and if we could heed their teaching, would throw much light on the dark future that lies before us.

I have already quoted the Federalist, to show the defects of the Confederacy and the mischiefs it produced. I shall rely on the same authority to explain the causes of those defects, and the remedy applied to them, not because other authority is wanting, but because that is the best, is familiar to most readers, and is sufficient.

The Government of the Confederacy was inadequate to the exigencies of the Union, because it was weak, and it was weak because it was a league and not a nation. "The great and radical vice," said Hamilton, in No. 15, "in the construction of the existing Confederation, is the principle of *legislation for States or Governments*, in their *corporate or collective capacities*, and as contradistinguished from the *individuals* of whom they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make *requisitions* for men and money, but they have no authority to raise either, by regulations extending to the individual citizens. The consequence is, that though

in theory their resolutions concerning these objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. . . . In our case the concurrence of thirteen distinct sovereign wills is requisite under the Confederation to the execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen,—the measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of Government and brought them to an awful stand. Congress at this time scarcely possess means of keeping up the forms of administration, till the States can have time to agree upon a more substantial substitute for the present shadow of a Federal Government. . . . Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall on our heads and crush us beneath its ruins."

I might cite other passages equally conclusive as to the causes of the defects of the Confederacy, but shall only add one more from No. 20, by Madison. After describing the Amphictyonic and Achæan leagues of antiquity, which, he says, bore a "very instructive analogy" to the American Confederacy, and the Germanic Association and that of the United Netherlands and the Polish Constitution, all of which were marked by "imbecility in the government; discord among the provinces; foreign influence and indignities; a precarious existence in peace and peculiar calamities from war,"—he thus sums up the causes of the failure of all. "I make no apology for having dwelt so long upon the contemplation of these federal precedents. Experience is the oracle of truth, and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth which it unequivocally pronounces in the present case is, that a sovereignty over sovereigns, a government over governments, a legislation for communities as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of

the order and end of civil polity, by substituting *violence* in the place of *law*, or the destructive coercion of the sword in the place of the mild and salutary coercion of the magistracy."

Such were the defects of the Confederation and the causes of them. What was the remedy? Obviously to create a real Government, that is to say, a Government which could command and not be obliged to request, which could act directly by means of its own laws and courts and executive officers, upon persons and things and not by requisition upon independent States. "If we still adhere to the design of a National Government," said Hamilton in No. 15 of the Federalist, "or which is the same thing, of a *superintending power*, under the direction of a common council, we must resolve to incorporate in our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens,—the only proper objects of Government. . . . In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of Government, nor would any prudent man choose to commit his happiness to it." Again in No. 21. "The next most palpable defect of the existing Constitution is the total want of sanction to its laws. The United States as now composed have no power to exact obedience or punish disobedience. . . . There is no express delegation of authority to use force against delinquent members, and if such a right should be ascribed to the Federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction in the face of that part of the second article in which it is declared, 'that each State shall retain every power, jurisdiction and right not *expressly* delegated to the United States in Congress assembled.' . . . If we are unwilling to impair the force of this applauded passage, we shall be obliged to conclude, that the United States afford the extraordinary spectacle of a Government

destitute even of the shadow of constitutional power to enforce the execution of its own laws."

These extracts might be greatly extended. They all lead to one conclusion, that the Confederation was a failure because it was not a nation, and that to avoid the impending dangers of separation, a Government must be formed with powers "adequate to the exigencies of the Union." "These powers," he says in No. 23, "ought to exist *without limitation*, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are *infinite*; for this reason *no constitutional shackles* can wisely be imposed on the power to which the care of it is committed."

Let us now compare these passages with the picture drawn by Burke of the British Union and the power of Parliament over it, given in the extract from his speech already quoted. Does he not point to the same defects and the same causes of them and the same remedies that are indicated by Madison and Hamilton. When Burke says, "Gentlemen who think the powers of Parliament limited, may please themselves to talk of requisitions. But suppose the requisitions are not obeyed. . . . Suppose one or two hang back and easing themselves, let the stress of the draft lie on the others?" Is not that precisely what Hamilton complained of in the conduct of the States under the Confederation? And what is the remedy? Hamilton and Burke proposed the same. "Surely it is proper," says the latter, "that some authority might legally say, 'Tax yourselves for the common supply, or Parliament will do it for you.'" "The Government of the Union," says Hamilton, "must carry its agency to the persons of the citizens. It must stand in aid of no intermediate legislation, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of its courts of justice. The Government of the Union, *like that of each State*, must be able to address itself immediately to the hopes and fears of individuals." (No. 16.)

And when he afterwards, as already quoted, declared that for the preservation of the Union and the safety of the nation, the powers of the National Government ought to be *without limitation*, and that no *constitutional shackles* can wisely be imposed on them, does he say less than Mr. Burke did, when speaking of the necessary omnipotence of Government in its imperial and conservative character, in relation to all parts of the Empire, he said that Parliament "superintends all the several inferior Legislatures, and guides and controls them without annihilating any? As they are all coordinate to each other, they ought all to be subordinate to her, else they can neither preserve mutual peace, nor hope for mutual justice, nor effectually afford mutual assistance. . . . And in order to enable Parliament to answer all these ends of provident and beneficent superintendence, her powers must be *boundless*."

If the writers of the Federalist, therefore, are authority on this subject,—and two of them sat in the Convention that made the Constitution,—our General Government is invested with the same power over the fact of Union, to preserve it or to dissolve it, that is possessed by an English Parliament. In its relation to the States, the General Government is placed in the same position that the British Government held to the Colonies, with this difference, that the people of the States are represented in the Federal Government, whereas the Colonies were not represented in Parliament, the only grievance of which they complained. This defect was stated with great force by Mr. Burke, in his speech on "Conciliation with America," of March 22, 1775, and he lamented as impracticable, because of the intervening ocean, the application of the same remedy, *legislative union*, which had been successful in the case of Wales and the counties palatine of Chester and Durham. These had always been rebellious and intractable until they were allowed to send members to Parliament, and thenceforth were loyal and tranquil, thus demonstrating, as

he said, "that freedom, and not servitude, is the cure for anarchy."

The union between England and Scotland is another example of similar success. It was not cited by Mr. Burke on that occasion, because he was speaking of the government by Parliament of dependent States, and Scotland never was dependent, but the case was cited by Mr. Jay in the Federalist, No. 5, as an example worthy our imitation. I have already pointed out the close analogy in all essential principles, and also the difference between the Scotch and English Act of Union and our Constitution, and we now see, in the relation of the Colonies to the parent country, the origin of the difference, which consists in the separate government of the States. When Scotland sent members to the English Parliament, she ceased to have a Parliament of her own, because it was no longer necessary, one legislature being sufficient for a country of such limited size. Had it been deemed practicable for America to send members to Parliament, the Colonies would have retained their local governments, because the extent of the country and its distance from England would have rendered legislation for it impossible. Our ancestors thus had two models before them, and they combined both in their scheme of Government,—an incorporate legislative union for all general purposes, and separate State governments for all local purposes. They intended to give the General Government powers "adequate to the exigencies of the Union," for these were the words of the original resolution of the Commissioners who met at Annapolis, and of the State Legislatures when they sent delegates to the Convention. "Powers adequate to the exigencies of the Union," mean, as explained by the Federalist, supreme authority over it.

The defect of the Confederacy was that it was a league of independent States. The object of the Constitution was to create a nation. For this purpose, legislative, executive and judicial power was provided, to act directly upon individuals, and it was declared that the Constitution and the laws made in pursuance thereof, should be the "supreme *law of the land*, anything in the constitution or laws of any State to the con-

trary notwithstanding." For all purposes, therefore, within the jurisdiction of the General Government, the States have no existence. The Government acts directly upon the people, and the people are the nation.

The delegates to the Convention that made the Constitution were chosen by the Legislatures of the States; but the Constitution was accepted and ratified, not by those Legislatures, but by conventions chosen by the people for the purpose. As soon as it was ratified, the States under the old Confederacy ceased to exist. They were annihilated by the express terms of the compact. Other States of a different character were created. Another central Government of a different character was also created. Nothing remained of the old Confederacy, or of the States which composed it. Upon the new States various restraints were imposed which were not recommendations, but commands; for at the same time a Government was provided with power to act upon individuals so as to secure obedience. What remained to the States? All the powers not *impliedly* granted to the General Government. This will be seen by a comparison of clauses already quoted,—one from the Articles of the Confederacy, the other from the Constitution. The former declares (Art. 2) that "each *State* retains its *sovereignty*, freedom, and *independence*, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States in Congress assembled." No provision of this sort was contained in the Constitution as made by the Convention. The chief object of the new system was to limit and modify the sovereignty and independence of the States, which had been the cause of all the evils that made a new system necessary, and to introduce a supreme power strong enough to control the States. But then, as since, the people were attached to their local governments, and dreaded central authority. These feelings caused the failure of the Confederacy, almost prevented the formation of the Union under the Constitution, have from time to time threatened its existence, and, finally, have destroyed it,—whether beyond hope of restoration depends on the chances of war. To satisfy such jealous fears, an amendment was added in these words:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people.*"

The difference between the language of this article and that of the Confederation marks clearly the change that had been made in the Government. Not a word is said in the former about the "sovereignty and independence" of the States: the reserved powers are not those of the States only, but of the people also; and when defining the authority delegated to the General Government and prohibited to the States, the word "expressly" is omitted. That it was intentionally omitted is proved by the fact that the conventions of Massachusetts, New Hampshire, and South Carolina, recommended an adherence to the phraseology of the Articles of the Confederation.*

The tenth article of the Amendments, indeed, like the second article of the Confederation, was merely declaratory. The Confederation *was* a Government of sovereign and independent States, which had formed an alliance for general purposes. The new Union was not a government of States at all, but of a Nation,—of a people,—with powers acting, not upon States, but upon individuals. It was a combination of central and local power, each supreme in its sphere, and was, therefore, as Mr. Madison described it, of a composite character,—partly Federal and partly National.† But the National character necessarily predominated, because the whole is greater and more important than any of its parts. The power of the whole must be, to a great extent, incapable of definition or restriction, because it is impossible to foresee all the cases which may require its exercise. Implied power was therefore given to the central Government, not merely by the language of the tenth article of the Amendments purposely modifying the second article of the Confederation, but by a clause in the Constitution expressly granting that general authority which every Government must possess for its own preservation. By the eighth section of Article I, the powers of Congress, which are

* Towle's History and Analysis of the Constitution, 240.

† Federalist, No. 39.

ordinary legislative powers, are enumerated; and then, to provide for possible omissions and unforeseen cases, this clause is added: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the *foregoing* powers and *all other powers* vested by this Constitution in the *Government of the United States*, or in any department or officer thereof."

Now, what is the meaning of the words "all other powers vested in the *Government* of the United States?" They do not mean those already enumerated as belonging to Congress, but something in addition thereto, for they are classed as "the foregoing powers." They do not mean the authority conferred upon the Executive and Judiciary, for that is included in the phrase "any department or officer thereof." Read by the light of history and the guiding expositions of the Federalist, written by the ablest of the makers of the Constitution, these words, "other powers of the Government," which was created to found and preserve the Union, mean, that the Government, considered as a whole, must possess all powers, whether enumerated in the Constitution or not, "adequate to the exigencies of the Union." And what are these powers, thus conferred in general terms, beyond those expressly mentioned? Are they not, in their nature, as Hamilton described them, "illimitable," "boundless,"—on which "no constitutional shackles can be wisely imposed?" Do they not constitute that "imperial character" described by Burke which must belong to every central government for its own preservation?

Why, then, it may be objected, if implied power so ample was conferred by the clauses quoted above, was the Fifth Article introduced, providing a process for amending the Constitution?

I have endeavored to show, in the preceding chapter, that power for this purpose must be lodged somewhere, because the Constitution must be altered to suit the wants of the people and to remedy defects in it revealed by time, or it must be destroyed; that the mode prescribed by the Fifth Article is so intricate and difficult of application that it can rarely be employed for the purpose, and never on a sudden emergency;

and, therefore, that the power must, when necessity requires, be exercised by Congress with no other restraint than the will of the people, expressed at the elections.

These are deductions from general principles, applicable to all governments, and an examination of the history of the Constitution, as well as of its provisions, leads to the same conclusion, and it is satisfactory to find the results of abstract reasoning borne out by facts.

We have seen that the defects of the Confederacy were caused by want of power in the Government to make and execute laws, and that therefore the States were tottering on the verge of the ruin threatened by disunion. We have seen also, that in order to form "a more perfect Union," our Constitution created a National Government, with powers expressed and implied, deemed adequate for the purpose, and very different from those of the Confederacy. There can be no better guide to the meaning of the Convention than the alterations they made in the Articles of Confederation, which they in part adopted. Those articles also had a clause providing for amendments. It was in these words: "The Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall *any* alteration at any time hereafter be made in any of them, *unless* such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislature of every State." We here see it expressly declared, that the articles could be altered only in the prescribed manner. That they were not altered in that manner, but abolished altogether in quite a different manner, is a significant fact to prove the uselessness and danger of such restrictions. No such barrier is erected by the Fifth Article of the Constitution. The words are: "Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments," &c. It does not say that no amendments shall be made, *unless* in the appointed manner. In this respect it differs, and we must suppose intentionally, from the similar provision in the Articles of the Confederation. And why does it differ? For the same reason, that the clause already quoted in reference to powers reserved to the States

and the people, differs from a similar clause in the same articles; for the same reason, that after enumerating the powers granted to the Legislature, a clause is added, giving general powers, lest those defined might prove insufficient; and this reason was that the Convention intended to make a strong government instead of a weak one, a nation instead of a loose league of States.

It is a rule for the interpretation of any instrument, that all parts of it should be allowed some meaning, and be so construed if possible as to make it a harmonious whole. The Constitution was made with great care. Every clause in it was deliberately considered, and no part, therefore, should by us be lightly disregarded. Every article was intended to bear a logical relation to all the others. Considered, therefore, with reference to the clauses already quoted, and in connection with the article of Confederation above mentioned, what does this Fifth Article mean? Does it mean that no amendments shall be made unless in the appointed manner? This cannot be the meaning for three reasons: first, it does not say so, and a matter so important would have been expressly stated. Secondly, the similar article in the Articles of Confederation does say so, and the difference proves an intention to differ, because the commission given to the Convention was to alter and amend those articles.* Third, such a restriction would be inconsistent with the implied powers granted in the clauses already referred to.

We must, therefore, understand the Fifth Article, as providing one mode by which amendments may be made, not as excluding others. It would be better to adopt that mode if possible, but should necessity require it, the Government is clothed by the Constitution with power adequate to any emergency. The Fifth Article is adapted to quiet times and peaceful discussions, and to great organic changes in the Government, which should be made always with deliberation and forethought. Should the Government overstep the limits imposed by the Constitution, under the stress of circumstances

* Federalist, No. 40.

which made it impossible to call into action the machinery of the Fifth Article, such an act would be either a temporary infringement or a permanent change in the law. If the former, a resort to the process of amendment would be unnecessary; if the latter, it certainly would be desirable, in order to ratify the change in the most solemn and formal manner possible. In neither case would the act of the Government be void, for its implied powers cover such cases. But should such action introduce organic change it might, nevertheless, be impossible or inexpedient to resort to the means prescribed in the Fifth Article to ratify the change, although the people might accept and approve it. Must we therefore say that the Constitution would be violated? Would it not be wiser to say, that one of its powers or instruments was not on that occasion employed? The case had not arisen when the mandatory part of the article could take effect. Neither two-thirds of Congress, nor the Legislatures of two-thirds of the States, had proposed amendments. When this happens, Congress is directed to act in the manner prescribed. But suppose it does not and cannot happen. Has the Government for that reason no power to save the Union by preserving the whole of its territory, or parting with a portion of it, or coercing the States; no power to maintain the authority of the laws or the honor of the flag? The Fifth Article does not say so. No part of the Constitution says so. On the contrary, the Constitution itself, its declared purpose, its English models, its inherited principles, the opinion of its ablest founders and contemporary advocates, and the eternal, immutable laws of nature, on which all governments rest, say, that the Government of the Union has and must have unlimited power to preserve the Union and itself, through a future whose exigencies can neither be limited nor defined.

The Act of Union between England and Scotland has been already referred to in this chapter as the model after which our own was in part planned, and the authority of Blackstone and of a note to his text was quoted to show the British law.

The "learned prelate" mentioned in that note was Bishop Warburton, and it will not be uninstructive to introduce here at length his remarks on the nature of an incorporate Union, for they state clearly the philosophical principles on which it must be founded.

"As in these incorporate Unions it commonly happens that the fundamental articles are declared by the contracting parties to be unalterable, it hath become a question, whether the new sovereignty can alter such articles without dissolving the Union. The difficulty seems to arise from the very nature of the Convention. Two independent States unite into one, on certain conditions, declared by the contracting parties to be unalterable. When these two States are equal, a new one arises from their incorporation composed of two; when unequal, the less is melted down into the more powerful: as in this latter case one only of the contracting parties now subsists; so in the other neither of them. But good faith requires that all contracts shall remain in force till dissolved by the mutual consent of the contracting parties themselves; but here the contracting parties *are no longer in being*, so that these articles of Union would seem to be perpetual, though that condition had not been expressly stipulated. On the other hand, the incessant flux of human things necessitates society in the course of time to make changes in the most fundamental parts of the Constitution. This is the difficulty, which seems not to be well solved, by only recurring to the common power of the sovereignty in repealing and changing laws, whose very title indeed shows the absurdity of an irrevocable law, as such law would tend to destroy the very power that puts it in force; for the reason of this act of power is founded on the supposition, that the laws revoked by the sovereign were *of the sovereign's enacting*, which is not the fact in the case before us. For the articles of Union were before the incorporation, had for their author powers different from what are now left for their abrogation,—one or both the contracting parties being no longer existent.

"To justify any alteration, therefore, we must have recourse to a higher principle, which is not the right of this or

that sovereign, *but of society itself as such.* Contracts between independent States are of the same nature as those between individuals. Now a number of individuals, let it be three hundred or three hundred thousand, agree in a state of nature to form themselves into a civil society. The first convention (or contract) by which the form of government is agreed on, is between individuals, where the consent of every one is necessrry to make him subject to it, and this form they declare to be unalterable, as the only one they are willing to exchange for their natural liberty. After this follows the second convention, in which protection and allegiance are mutually promised by sovereign and people, whereby the contracting parties in the first became annihilated, and a new factitious person is produced; as appears from hence, that in the first convention the consent of every one is necessary to conclude him, in the second the majority is sufficient. Now, who ever doubted that this new-created body had a right to alter the form of government? For the necessity arising from the nature of things requiring an alteration, and the contracting parties being no longer existent, their survivor *must needs be deemed their substitute* on whom *all* their power is devolved."*

Let us apply these truths,—for such they are,—to our Union. The contracting parties were the States, equals, because each was sovereign and independent. By agreement, the consent of nine instead of all was made necessary to the completion of the contract. The object of the contract was to form a new Government, in which they were to lose their old and assume another nature. When, therefore, that Government was made, the old Confederacy and the States that composed it ceased to exist. Those States had *absolute* power to create any form of government they chose. They are no longer in being. What, then, has become of their power? It belongs to their survivor, which must be their substitute, for any act of supreme sovereignty that necessity may require. They had the right to make of the Government what

* Warburton's Alliance in Church and State.

they pleased; their substitute has the same right. True, it may be said, in the manner prescribed by the compact. But such a condition would be a limit on the power of the substitute, whereas the power of the original parties was unlimited. These parties are no longer in being. Society, as such, that is to say, the people, the nation, only exists, and the nation must have supreme power over its Government.

What then becomes of the rights of the States, may be asked, if unlimited power is thus ascribed to the General Government? The old States of the Confederacy were annihilated, it is true, by the adoption of the Constitution, but new ones were by it created, which, if not sovereign and independent, have absolute authority within their sphere. They form an essential part of our system, which is both federal and national, and are necessary to satisfy the desire for local self-government, which is a ruling element of the Saxon nature.

The answer is that the central power, how great soever it may be, is under the control of the people, and represents their opinions and will. They act upon it by means of the elections, periodically, at short intervals, either as States or as individuals. Every four years the people choose a President; every two years a House of Representatives; every six years the *States* choose a Senate. The Senate is the appointed guardian of the rights of the States in their corporate character. Each State has an equal vote in the Senate, so that the smaller may not be overborne by the larger. No bill can become a law without the concurrence of the Executive and a majority of both Houses of the Legislature, or without the sanction of two-thirds of the Legislature, should the President refuse his consent. Granting, therefore, the unlimited power of the Government over the Union and the Constitution, it means nothing more than the unlimited power of a majority of the people, acting both as a confederacy and as a nation. An infringement of the Constitution by the Government will be either approved by the majority of the people or disapproved. Their approbation must be regarded as evidence that the act was wise and necessary. If it be against the will of the majority, the next Congress can remedy the evil. Whilst

the representation of the States, as such, in the Senate, was intended to secure their equality, yet, inasmuch as the State Legislatures who appoint the Senators are themselves elected by the same people who choose the President and the House of Representatives, and who are imbued with the feelings of State pride and love of local power which characterize the nation, the rights of the States are really as much under the guardianship of these latter as of the Senate, and as likely to be respected by them.

These are the only means by which the position of the States is protected by the Constitution. Those means are instruments by which the people can at all times limit or enlarge the action of either central or local power, maintain a just balance between the two, and control the Union,—to preserve it, to dissolve it, to add to it, or to diminish it, as circumstances may require. The State Governments add greatly to the strength of local as opposed to central authority. They are organized bodies, always ready to act, either by their Executives or Legislatures, or both. A violation of the constitutional rights of one State would menace the rights of all. The Government of the State which supposes itself injured would at once sound the alarm, and might count on the sympathy and support of the others in all legal means of redress, and, those failing, in extra legal means,—forcible resistance,—unless, indeed, the act of the General Government was one approved by the majority of the people.

These defences are all that the case admits of, and they are more than sufficient. The danger to our institutions lies, as the writers of the Federalist predicted and as experience has proved, not in the strength but in the weakness of central as compared with local power. The encroachments to be dreaded are those of the States on the General Government,—not of the General Government on the States. Such must be the case, because local attachments are much stronger than any feeling, for a country so extensive and diversified as ours, can possibly be. An Englishman loves England, a Scotchman Scotland, an Irishman Ireland, a thousand times more than either of them loves the British Empire. So it is with us, not

only in relation to States, but to groups of States. New England, the Northwest, the Middle States, the South, are becoming more and more distinctly marked and united by their interests, their manners, and their sentiments every day, and would each make common cause in resisting a violation of the rights of any one of their number. It was attachment to local power that caused the separation of the Colonies from England. The same feeling opposed almost insurmountable obstacles to the adoption of the Constitution, has since more than once threatened the existence of the Union, and at length has caused the present war, which may perhaps destroy it.

Mr. Madison was therefore prophetic when he said that "the first and most natural attachment of the people will be to the Governments of their respective States. . . . A local spirit will infallibly prevail much more in members of Congress than a national spirit in the Legislatures of the States. . . . Ambitious encroachments of the Federal Government on the authority of the State Governments would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every State Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole."* The language of Hamilton is to the same effect: "It may safely be received as an axiom of our political system, that the State Governments will in all possible emergencies afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The Legislatures will have better means of information; they can discover the danger at a distance; and, possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in

* Federalist, No. 46.

the different States, and unite their common forces for the protection of their common liberty."*

It might happen, certainly, that a tyrannical majority would, notwithstanding all these securities, persist in unjust and oppressive measures. But no Constitution can guard against a determined violation of duty by every branch of the Government, or provide for all the dangers that a fertile imagination may conjure up. The most limited powers are capable of unlimited abuse, for it is impossible to confer power without also conferring the ability to abuse it. A Government that is constantly under the control of the people will be what the people choose to make it. The fault must therefore be in them, should it fail, for they have absolute power over both its administration and its form. The central Government cannot disregard the reserved privileges of the States, except by the consent of a majority of them, given by their vote in the Senate. Should such an act be necessary to the safety of the Union, then it would be a just and wise exercise of the supreme power which every Government must possess for its own preservation. Should it be unnecessary or inexpedient, the next Congress, representing both the States and the people, could and would remedy the mistake. Should the case be one of criminal usurpation, with a design to injure and oppress, or to create a revolution in which all branches of the Government joined, it is one against which no Constitution can provide; and, there being no legal means of redress, the only resort is to that ultimate natural right of self-defence, to which our ancestors appealed when they withstood the power of England.

It thus appears that our Constitution actually does, what it was intended to do, create a Government "adequate to the exigencies of the Union." These words mean now just what they meant when the Constitution was made,—a Government adequate to the preservation of *such a Union as the people*

* Federalist, No. 28.

*choose to have or are able to have.* When the Constitution was ratified the Union consisted of thirteen States. Before the present war, it consisted of thirty-four. Between these two points it has been constantly changing. What it will be when the war ends, no one can predict. The title is ambulatory and must be so of necessity. But this much is certain, that the Government representing the majority of the States and of the people must have absolute power over the Union, in order to be adequate to its exigencies, for these exigencies are illimitable as the chances of futurity, and may demand that the Union be either maintained or dissolved by mutual consent or against the consent of some of its members.

The American people, acting in the double capacity of States and of a people, agreed to form a Government that should be a confederacy and a nation. In its Federal character, that Government may rightfully maintain the Union, as it exists at any given time, or consent to the withdrawal of some of its members, or expel those whose presence is injurious to the others, and yet the Union in a legal sense would still remain, for the Constitution does not limit its size, and that which contains the majority of the people, which retains the insignia of power, the name and the flag, and maintains the continuity of authority, is the legal Union. In its national character the Government may defend and keep, if it can, the whole of its territory or dispose of a part of it as necessity or expediency may require; whilst, as I have already shown, merely as a Government, the creature of a compact by virtue of which the contracting parties ceased to exist, and which therefore is their substitute and the inheritor of their power, it has and must have supreme authority, as representing the majority of the people, to do whatever may be necessary for the accomplishment of these purposes.

It would be a waste of words to argue that the preservation of the Union is one of the "exigencies" for which the Government has ample power. It was made for that very purpose.

Upon this point our convictions ought to be clearer, for our experience is larger than that of our ancestors. They had felt the evils of a weak and partial Union, and saw immediately before them the manifold dangers of complete separation. All these we now feel and see, and they appeal to us with greater force, because we have so long enjoyed the unspeakable blessings of that "more perfect Union" which the Constitution was intended to create and did create. The only Union to which our ancestors could look back was that of the Confederacy, so prolific of disaster, and to their position as colonies of England, connected with painful memories of dependence and oppression, but which, bad as it was, was better than the chaos threatened by separation. They knew well what centuries of disastrous war led at length to the Union of England with Scotland, and they could see nothing before them as a consequence of the separation of the States but perpetual war; war between the States and alliances made by these with European powers leading to foreign war. Therefore all the great men of the day were earnest in their exhortations to preserve the Union, and exhausted their powers of argument and persuasion to prove its importance, or rather its absolute necessity, as the condition of all national power, glory and happiness. The counsels of Washington were animated throughout by this spirit, and particularly his Farewell Address, and the writers of the Federalist were eminent advocates of the same opinions. Those who are disposed now to think lightly of the Union, may read with advantage the numbers of that work devoted to the subject. I shall make but one extract, which has peculiar significance to us at the present time. It relates to the risks of a standing army, which in England have been averted by Union and her insulated position, and which here might be averted by Union and the ocean which separates us from Europe.

"The Union itself," says Mr. Madison, "which the Constitution cements and secures, destroys every pretext for a military establishment that could be dangerous. America united, with a handful of troops or without a single soldier, exhibits a more forbidding posture to foreign ambition than

America disunited with an hundred thousand veterans, ready for combat. . . . Being rendered by her insular position, and her maritime resources impregnable to the armies of her neighbors, the rulers of Great Britain have never been able, by real or artificial dangers, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible so long as they continue a united people. But let it never for a moment be forgotten that they are indebted for this advantage to their Union alone. The moment of its dissolution will be the date of a new order of things. . . . Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of Europe. It will present liberty crushed everywhere between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy and revenge. In America the miseries springing from her internal jealousies, contentions and wars would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe."*

Union and isolation have also secured Great Britain from invasion and from the devastations of war which have constantly visited the nations of the Continent. England has thus become a hive of industry and a storehouse of the vast treasures of useful and beautiful things, created by art and accumulated by wealth and taste through long centuries. The island is covered with cities and towns and factories, and happy homes, of all grades, from the yoeman's cottage to the

* Federalist, No. 41.

nobleman's hall and castle, whose parks and gardens and well-tilled fields have never, for many generations, been trodden by the foot of an enemy. All that the arts of peace have produced have therefore been garnered and guarded from the destroying touch of war, whilst the warlike genius of the people has found ample scope for exercise and for triumph beyond the encircling sea. It was not so before the Union. It will not be so with us when our Union is destroyed, as the Southern States, desolated now by contending armies, may testify.

The question of Union, therefore, is now to us precisely what it was to England, Scotland and Ireland, and what it was to our ancestors in 1787. Shall we be a great and powerful nation, with free institutions, strong enough to withstand the world in arms, and able to develop in peace and security the unequalled resources of our great inheritance, or shall we be divided into two, or perhaps four or five republics, jealous of each other, each seeking to strengthen itself against the other by internal or foreign alliances, and engaged in perpetual war? Shall we be a gigantic Britain, both a confederacy and a nation, with central and local power, each acting in its appropriate sphere, manifold and one, steadily pursuing our mission to cover our vast domain with the monuments and trophies of civilization, and to make it the home of liberty, science and refinement; or shall this Northern Continent of ours become another Europe, weighed down by taxes and standing armies, governed by royal families and intersected by lines of fortresses and custom-houses?

This question, long foreshadowed, is now brought home to us as a practical reality. Was the idea we so long cherished of a great republic a mere dream, and our faith in self-government a delusion? Can we, as one people, keep this magnificent territory, stretching from ocean to ocean and almost from the arctic to the torrid zone, as an undivided whole, or must we parcel it out into separate sections, each giving up its share and interest in all the rest? This is the question for us to-day. It is one that the central Government has a right to decide, if the principles advanced in this and the foregoing chapter be correct. It is one which each

State has a right to decide, according to certain doctrines which have had great influence in our politics. What may turn out to be the judgment of the majority of the American people about it, belongs to the future, though from present indications they may be expected to say, that the Government has a right to preserve the Union, if it can. Whether they have or have not the constitutional authority, Congress and the President have undertaken to exercise it, trusting to the support of the people. Under the circumstances, it was impossible to appeal to the Fifth Article to decide the question of power. The Government was obliged either to permit the Union to be destroyed by armed violence, or to make war upon the rebellion. It chose the latter, and whether within our former limits there shall now immediately be one nation or more than one, will depend upon the fortunes of that war.

That the preservation of the Union may depend on the fortunes of war, is clear proof that the Government must have power to dissolve the Union or prove inadequate to the exigencies that may grow out of war. The right to make war includes necessarily the right to make peace. Cases may arise in which it would be impossible to preserve the Union by force, or unwise, unjust and inexpedient, and in such cases the separation of resisting States would be a necessary condition of peace. The right to make war or peace includes also the right to prevent war, by yielding to reasonable demands. The future may disclose cases in which the demand for separation would be reasonable, and therefore ought not to be refused. The Constitution was intended to provide for all the exigencies of the future, and the claims of justice and the wants of the people. Among the last none are more imperious and positive than the desire for local self-government, and for the privilege of altering or abolishing their political institutions. The Union was intended to be a benefit, not a burden; a guarantee of freedom, not a fetter. Should it become a burden and a fetter, it will not be worth preserving, and ought to be dissolved. But how is it to be dissolved? By mutual consent, with deliberation and due regard to all rights, or amid the calamities, confusion, animosities and uncertain

results of civil war, leading of necessity to other wars? The former is surely the more desirable mode, and the only one worthy of rational, Christian men.

That it may be adopted, the majority of the people and of the States represented in the Government, must have the power to decide upon the claim of a State or States to withdraw from the Union. Either the Government has this power, or it has no power to avoid civil war, which would inevitably follow the refusal of a just and reasonable demand for separation. Either the Government has this power, or it is bound to preserve the Union, right or wrong, reckless of consequences. The power is necessary for the preservation of the Union, that is to say, as already explained, the Union of the States willing to remain united under the Constitution, which in any probable circumstances, we may expect to be, for many years to come, a majority. But if the right to decide this question is in the States severally, and not in the Government representing all of them, or if the separation, forcible or permitted, of some, is a severance of the legal tie that binds the others and the destruction of the authority of the central Government, then the future presents only this alternative: the preservation of the Union by force forever, or should that be impossible as to some of the States, the immediate division of the country into as many nationalities as interest or inclination may lead the others to form. The protecting power of the Government being withdrawn, motives of self-preservation would at once induce such combinations. But with the central power supreme, the evils of disunion might be restricted to the loss of a part,—perhaps a small and insignificant or even injurious part,—of our great domain, and the Union, or *a* Union under the old Constitution and the existing authority, large enough, rich enough, and strong enough for security and national dignity, be preserved.

Our country, as it existed before this unhappy war, stretching from sea to sea, and through zones of varied climate and production, with its lakes, its rivers, its coasts, its vast interior spaces of fertility, producing in profusion supplies for all wants; our people, the most forcible and intelligent on

earth, peacefully employed in cultivating and adorning their splendid domain, and at the same time advancing in all elegant and useful knowledge; our Government, with its central power, like the sun, shedding light and warmth throughout the system, and holding to their appointed orbits the local powers, without disturbance of their separate motion; such a country, such a people, and such a Government, formed indeed a grand and noble spectacle. Was it not too grand and too noble to endure? Are there not causes that must sooner or later disturb the nice balance of a structure so artificial and elaborate? Does it not require for its working and preservation a combination of ability and power which cannot be supplied by the people to the Government?

We have now thirty-four States, including those in rebellion. Others are yet to be formed out of territories now a wilderness. These and many more, now thinly settled, are the destined seats of populous and wealthy communities. Our people now number thirty millions of the white race. The child is born that will see them more than a hundred millions. Seventy or a hundred years is a short period to look forward to in the life of a nation. Forty or fifty States and a hundred millions of people, with a government elected by universal suffrage, maintaining central power and local power in harmonious action, without hindrance or collision, is, perhaps, among the possibilities of the future. It is certainly not among the probabilities, for it has never existed in the past. The Roman Empire became a military despotism after it had failed as a republic, and then fell to pieces as a despotism. The British Empire is governed by an Imperial Legislature combined with an hereditary throne. Its power extends over about two hundred millions of people, and five millions of square miles. About forty millions of these people are of the white race, and together with the inferior races, are subject to a government of which one branch only, the House of Commons, is elected by a small minority of the population of the home countries, which it is considered to represent, and which amounts in all only to twenty-seven millions. Let us suppose that by timely concessions England had retained all her American Colonies, which would have

given her now an Empire of seventy millions of the superior race, and that the whole, by universal suffrage, returned members to the Houses of Parliament, and elected also a supreme executive magistrate every four years.

Is it conceivable that the Empire would hang together for a quarter of a century? Where would be the central power? In London, or in New York, or in Quebec, or in the East, or would there not soon be several centres of power, as Rome, notwithstanding the prevalent barbarism of the Provinces and its military despotism, was soon divided into a Western and Eastern Empire, and these again into smaller sections? Would not a domain so vast fall asunder by the weight of its several parts unless braced by some external force, strong enough to keep them together? That external force is now the absolute power of the home Government. But it was not strong enough to hold us when we were three millions. It scarcely professes now to hold Canada, and it retains the other dependencies, only because they are not able to stand alone. If England gave to her Colonies the right of representation in Parliament, she would soon be turned out of doors, notwithstanding her Lords and her Monarchy, as King Lear was by his daughters.

There are limits to the size of a nation, because there are limits to human ability. Every addition brings with it new objects to occupy the time, thought and labor of Government, new wants to satisfy, conflicting claims to adjust, importunate demands to answer, jealous rivalries to soothe. Increase of territory, or what amounts to the same thing, the growth of wealth and population in extensive regions before a waste, multiplies the details of business, adds to the number of officers, swells the revenue, and with it the danger of corruption. The more rapidly a great nation advances in wealth, intelligence and population, the more urgently does it require high qualities in the Government, and great power also. But the high qualities cannot be got by any process of universal suffrage yet discovered, and the very intelligence and prosperity of the people, render them jealous of power and restive even when they control it.

The dominant passion of the Saxon race is for local self-

government. They submit unwillingly to a distant central authority, though represented by it, and only for the sake of protection, of security, of national power and greatness. But in a country so vast as ours, the share of some parts of it in the central authority may become too small to satisfy the people of those parts. Local attachment is stronger than any affection for a whole can possibly be. A section may find itself in a permanent minority, always outvoted, and either actually or liable to be oppressed and treated as an inferior. A section may become so powerful, and at the same time may be so divided by its interests, its manners and sentiments, and by geographical lines from the rest, that it may feel able to become independent, and to stand alone as a separate nation. In that case it could combine within itself local and central power, the latter more under the control of its people than that of the existing General Government, and yet sufficient to give it security as an independent State. Under these circumstances, and others that are supposable, the desire for independence would arise. Independence would be demanded. Must it be refused, however reasonable, however just the demand might be, and however respectfully it might be made? And what power is there to grant it, to arrange the terms and conditions of the grant, except that of the General Government?

This country, fully peopled or half peopled, is large enough to make five or six great nations, each with its system of central and local government. The time will come when it will be so divided, with or without such a system for each of its parts. Must there be a civil war at each division, because the Constitution has not expressly granted to Congress power to dissolve the Union? Which is better, that these inevitable changes should occur, when in the fulness of time they become necessary, amicably, by mutual consent and with a just regard to all rights and careful provision for the future, or that each separation should be attempted by rebellion, the result of which would be, if successful, a revolution, followed by years of bitterness and probable war; if unsuccessful, the forced obedience and subjection of the weaker party, in which

there can be no true union. Would it not be wiser to preserve the whole Union as long as possible, by wreathing the chains of necessary authority with garlands of benefit and blessing, so that if possible none shall wish to leave it, but when a swarm is ready to have a hive of its own, to permit it to depart with good wishes and friendly adieus, so that the kindness of old fellowship and kin may be afterwards preserved?

In this way only can the Union be maintained, not indeed forever, for nothing human lasts forever, but the Constitutional Union, the Union seceded from and whose Government permits separation, may be maintained, though in process of time it be reduced to less in number than the original thirteen States, just as Britain when she lost her American colonies was still Britain, and would be, were she to lose Canada and India and be reduced to the home countries. It is very true that with the separation of even an inconsiderable section, a new era would commence. The separated portion might at once seek to strengthen itself by foreign alliances with European nations and by intrigues to induce other States to join it. Border wars and foreign wars would follow and the charm of inviolability, of peace at home and security from abroad, so long the happiness of America, as it has been and is of England, would be broken. The principle of the balance of power would at once begin its action and repeat here the history of the continent of Europe. All this we see foreshadowed in the present war. Only by preserving the whole Union in its integrity and its power can this fate be averted. It may perhaps thus be avoided for the present and the evil day be postponed for another generation. That will depend on the issue of the contest now raging between North and South, a contest which waxes in its dimensions and force and bitterness every day, so that its results cannot be predicted. But constitutions and laws are intended not for the present hour only and for the generation that is passing away, and his ken is limited who cannot include within their scope the interests and happiness of a distant posterity.

It is very true that the lakes, rivers, coasts, mountain

ranges and the general structure of our country, facilitating intercourse, all indicate the advantages and proffer the physical means of union. It is true also that the common origin, language, literature, laws and traditions of the yet dominant race point in the same direction. Nevertheless, the causes already mentioned, the vast extent of our territory, the enormous forces of numbers, wealth and intelligence that are growing up in the several parts, the influences acting upon those parts to assimilate and group them into distinct sections, the diversities of race which are beginning to play so important a part in our politics and the extreme difficulty of governing such an empire by democratic institutions, all warn us to expect the fate of continental Europe. To be forewarned ought to be, to be prepared, and the question for wise men is, not how to resist the inevitable, but how to meet it and how to postpone and mitigate its evils.

There are two evils to be avoided in dealing with the question of the Union. One is an unjust and unreasonable effort to coerce a State or States, so as to produce a civil war, and another is, the sudden rupture of the legal tie binding all, the consequence of which would be, immediate combinations according to geographical and other affinities, not likely to be effected peacefully and leading directly to the misfortune most to be dreaded,—the division of the country into many independent nations.

How are these evils to be avoided? Surely by slow disintegration. By resisting unjust demands for separation and granting just ones. By maintaining the whole of our empire whilst we can and ought, and by giving up parts of it only when we must or should. Justice satisfies all men, and by dealing justly and more than justly, kindly and generously, with our departing brethren, we might form with them another union of friendship and alliance, and thus avoid or diminish the risks of war. We can afford to lose the States now in rebellion and yet remain a great and powerful nation, strong enough to defy them and their foreign allies should they have any. Freed from the disturbing influence of the negro race, a Northern Confederacy, still the United States,

under the old Constitution and the old flag, if wisely governed, might be expected to endure for many years.

Under the influence of favoring causes, the adventurous genius of the Saxon race has improvised a powerful community on the shores of the Pacific. It has grown with unexampled rapidity. It has every element of prosperity. A healthful and agreeable climate, a bountiful soil, gold and silver, mountains, rivers, and a sea opening a highway to the riches of the East, furnish to this favored land ample resources for agriculture, manufactures and commerce. It belongs to a people who well know how to develop its resources. They can supply themselves with every comfort and luxury demanded by civilization and refinement. They have the American Constitution, the common law, the language and literature of England, and they have the Anglo-Saxon love of self-rule, of power and supremacy. They are separated by mountains and deserts and by the ocean from the rest of the Union and from the world. The time must come when they will say, "We are strong enough to stand alone, to be ourselves a nation. Washington is distant. Why should a Government seated there rule us, when we might have one here at home, more under our own influence, better acquainted with our affairs? We do not need protection. We can protect ourselves. We need nothing that the United States can give us. We can supply all our wants by our industry, or by our gold we can procure the productions of every climate. Why should New York control our interests? Why should the Mississippi Valley help to govern us? Let us go to Washington and tell this to our brethren. Let us ask permission to withdraw in peace and friendship from the Union."

Could such a request be answered by ships of war and the roar of rifled cannon? Would not justice and good policy alike require that it be granted without hesitation, and that it be followed by a treaty of perpetual alliance and good feeling? That done, a Union would still remain. Supposing the event delayed for even so short a period as twenty years; the United States, under the old Constitution and the old flag, would still be a great and powerful nation. And the process might go on

from time to time, with such intervals as wisdom and justice could secure, and thus be spread over many years, during which the dreaded consequences of disunion might be prevented and the fate of Continental Europe avoided.

It is obvious that if the central Government has authority either to maintain the union of all the States or to permit the separation of any, as justice or expediency may demand, there can be no such thing as the constitutional right of secession in a State. The reasoning which proves the power of the Government to preserve the Union disproves the right of a State to break it,—an idea wholly inconsistent with the existence of a National Government.

Both the Constitution itself and its history show that it created and was intended to create, at the same time a confederacy and a nation, and that its federal is necessarily subordinate to its national character. Granting, however, all the importance claimed for the federal attributes of the Government, if it was a compact, it was made to form a Union,—a "more perfect Union," as itself declares, than existed under the old Confederacy. Had it been intended that one of the States created by this compact should have power to defeat its object, a right so important would have been expressly stated, and some formal mode provided for its execution.

Those who advocate the right of secession are what are called "strict constructionists," and deny to the Government all powers not expressly enumerated in the Constitution. They nevertheless do not hesitate to resort to inference and implication to serve their purpose. The only part of the Constitution from which the right of secession can possibly, by any ingenuity, be implied, is the tenth article of the Amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States respectively*, or to the people." Among the powers thus reserved to the States, these reasoners contend, is that of seceding at pleasure from the Union. It would be a violent presumption that gave to these words a meaning destructive to the primary object of the Constitution and the Government it was intended to

create. A more just rule of construction would be to sacrifice the article to that object and that Government. But no such sacrifice is necessary. The powers thus reserved to the States are their powers of local self-government by their own executive officers, legislative assemblies, and courts,—which powers are neither delegated to the United States nor prohibited to the States. The language of the article being thus fully satisfied by a meaning consistent with the whole history, tenor, and spirit of the Constitution, it is illogical to give it an interpretation inconsistent with all.

Nevertheless, this doctrine of the right of secession, however absurd and incompatible with the general principles on which every Government must be founded, has been the disease of ours from an early period of its history, and now threatens its life. Its fit companions are the right of nullification; that is to say, the right of a State to veto an Act of Congress, and the right of a State or of the Supreme Court to declare a measure of the Government null and void because it violates the Constitution, and to release the people from the obligation of obedience to the laws. Such are the wild theories of jurisprudence by which rebellion has heretofore been prompted, and by which it is now fed, supported, and advocated. They are as inconsistent with truth and reason as they are with the principles of our Constitution, or of any possible Constitution. They are consistent only with anarchy and misrule; and the wonder is, such fallacies prevailing, not that the Union and the Government have been attacked by rebellion so soon, but that they have escaped it so long.

It rarely happens, however, that any opinions long held by large numbers of men are without some foundation of truth. The claim of a legal right of secession arises from the desire for self-government which is instinctive in our people. It caused our Independence, it is the animating principle of our Constitution, it is the efficient guardian of the federal character of our system. The right of the people to alter or abolish their form of Government at pleasure cannot be denied by any one of the Saxon race.

But it is a moral right, and cannot be made a legal one

without destroying the necessary authority of Government. It is a right, the exercise of which may be wise or foolish, just or unjust, conservative or destructive, according to the facts and circumstances of the particular case. It may be rightful resistance to oppression, or wicked and treasonable rebellion against wise laws and a beneficent Government, instigated by designing leaders, and supported by the folly and passion of a deluded people. According to its character, therefore, it ought to be treated. Power to judge it must be lodged somewhere, and where can it be lodged? Not, surely, in the discontented State, for that would make it a judge of its own cause, and subject the rights and interests of all the other States to what might be the crime or folly of one. What tribunal so fit as the central Government, which represents the whole, and how can the Constitution of that Government confer upon a part the legal right at any moment to sacrifice the whole?

A constitutional right of secession is inconsistent with the necessary authority of the central Government, and with its power to preserve the Union. Nevertheless, the principle upon which it is founded is a true principle, and the moral wants out of which it has grown must be satisfied. They can be satisfied, consistently with the preservation of the Union and the just supremacy of its central authority, only by ascribing to that authority power to grant a request for secession which in justice ought to be granted, and power to refuse it when it ought to be refused.

In the year 1713, seven years after the Act of Union between England and Scotland, the Scottish people became dissatisfied with a tax imposed by Parliament. They declared that it was injurious to them, and bore upon them unequally as compared with the people of England. Discontent rose to such a height that the Scotch clamored for a dissolution of the Union. They, however, did not call a convention to pass an ordinance of secession, nor did they determine to resist by force the collection of the tax. During the recess of Parliament, the Scotch members of the Houses met and deliberated on the proper plan to pursue. They sent a committee to lay their grievances before the Queen. When Par-

liament assembled, one of these members moved in the House of Lords, that leave be given to bring in a bill to dissolve the Union. The bill was discussed. Scotland had a hearing and a vote, and so also had England, who was a party with weighty interests involved in the dispute. Had the question been debated only in Scotland, England would have had no hearing. Had Scotland possessed the right of secession, the Union, under the excitement of the moment, would have been destroyed. Fortunately it was saved, and remains to this day stronger than ever. It was saved wholly because Parliament, representing both Scotland and England, had supreme power either to maintain or dissolve it. No appeal would have been made to Parliament but for this power. The angry passions of the Scotch would have decided the question, and would have decided it to their ruin.

As it is manifestly just that a question which, like that of maintaining or dissolving the Union, involves so deeply the interests and destiny of all the States, should be discussed by the representatives of all, and decided by a majority of them, so it is the surest way of preserving the Union. Debate brings out the truth, reveals dishonest motives and ambitious intrigues, discloses the interests at stake, the reality of grievances complained of and their remedy, if they have a remedy. Above all, the forms of legislative proceedings interpose delay, during which angry passions may subside, moderate men come forward with moderate measures, the sober second thought of excited parties have time to act, and the public sentiment of the nation, roused by a crisis, to make itself heard with commanding influence. A bill brought into Congress to authorize the withdrawal of a State or of several States, would not be decided in a day. It would excite the attention of the whole country. Parties would divide upon it. The daily press in multitudinous sheets would present the subject in all its bearings to the people. The people would express their opinions in town meetings and public assemblies in every State. The States in their corporate capacity would make themselves heard through messages and proclamations of their Governors and resolutions of their Legislatures. In a

word, the whole battery of public opinion, with all its formidable apparatus, would be brought to bear upon the subject.

After all this deliberation and the action of these conservative influences, the bill might be postponed to await the result of further reflection and of conciliatory measures among the people of the State that introduced it, or it might be passed with just conditions imposed on the seceding States, or it might be rejected as unreasonable and revolutionary. In either case the question would be settled with the forethought and order and prudent regard to consequences, worthy an enlightened people. Should secession be permitted, it might be accompanied by such terms and treaties as would delay or mitigate the evils of disunion. Should the demand be refused for good reasons, made apparent by the debate, and explained as they probably would be by the arguments and eloquence of eminent men, and supported, too,—as they probably would be,—by the public sentiment of the nation, these would have their influence in reconciling the people of the States seeking separation to the Government of the Union. The persuasive force of these reasons would be greatly enhanced by the admitted right of the Government to dispose of the question, and to coerce obedience.

It is not likely, indeed it may be considered impossible, that secession will ever be attempted by a single State. Its position would be too weak and contemptible, whether it failed or succeeded. The insanity of even South Carolina did not extend so far as that. The Anglo-Saxon people, if they love local self-government, love power too, and their taste is to found great nations, not petty principalities. Scotland will not secede from the British Empire, or the English in Ireland, or Wales, but we did, and Canada will, and so, in the fulness of time, may Australia. In like manner there is no danger that Massachusetts or Pennsylvania, or Ohio or California, will ever desire to withdraw alone from the Union. But it may happen hereafter that New England or the Middle States, or the Northwest or the Pacific States, shall think themselves strong enough to make a great nation. It is to meet such cases that the power of the Government to permit secession

on just and reasonable terms is most important. With this power established, secret plots and conspiracies would be unnecessary. To desire secession, openly to propose it, to endeavor to secure the co-operation of like-minded States would not be treason or sedition, because the object of all these efforts would be, not to resist or overthrow the Government, but with its consent and by its authority to form another nation. The right claimed would be under the law, and not over it, the claim itself would impliedly recognize the privilege of refusal and recognize also the existence of other claims, those of the other States, as worthy consideration and respect.

A demand so made by a powerful section would be entitled to a respectful hearing, and would receive it. Should it appear that separation was the wish of the people, and that wish the conclusion of their sober judgment, not the rash and hasty plunge of popular passion, not the result of corruption or agitation, or intimidation, or of the intrigues and arts of demagogues, it is safe to say, that it would not be refused. It would not be refused for two reasons. First, because a claim so made and so supported would be met by the hearty sympathy of the American people. They could not reject it without violating their dominant impulses and convictions, denying the principles on which their Government is founded, and contradicting their annals from Alfred to Washington. All these proclaim the right of man to self-government, and the determination of the Saxon race to maintain self-government. But they proclaim also a hatred of sedition, privy conspiracy and treason, a love of order, law and legitimate authority, and an equally firm determination to acquire national power and rank, and to maintain a National Government able to support them. All these sentiments would be satisfied by yielding to the intelligent, well-ascertained desire of a great section for independence, provided such a measure be respectfully urged, with due legal forms and fair consideration for the interests of other parties concerned. But all the dominant feelings of the people, and the noblest traditions of their history, would be outraged by an ex parte act of separation, executed by a State or a company of States, without notice, without consultation

with the others, or deference to their wishes and interests, and in defiance of the national authority.

Another reason why a claim for independence founded in justice, supported by the people of a large section, and respectfully presented, would be granted is, that it could not be refused without a civil war. A seditious insurrection in a State, or in any number of States, to resist the authority of the Government, or even to overthrow it, unless supported by the majority of the people, does not rise to the dignity and importance of civil war. Such was the Whisky Insurrection in Pennsylvania, and some others of a similar character in our history. But when the whole people of a large and powerful section take up arms to vindicate rights, real or imaginary, or to resist wrongs, real or imaginary, that is civil war, and it is a calamity not to be lightly encountered, even if the insurgents are unreasonable in their demands. It must be encountered, nevertheless, by the Government when necessary to defend itself, its honor and dignity, its territory and the authority of the laws. A just war for these purposes would strengthen the Union, even though a portion of it might be lost, consolidate its power, and elevate its character at home and abroad.

But a demand for separation may be just and reasonable. If so, to oppose it would be unjust and unreasonable, however much material interests might apparently require opposition. What good result could it produce? Should the Government be defeated, it would, after a vain sacrifice of life and property, lose not territory and power only, but character also, and the mortification of defeat on one side and the exultation of victory on the other, would be the cause of future wars between the embittered sections. On the other hand, if the Government succeeded in reducing resisting States to submission, and imposing upon them the yoke of a hated authority, would a compelled Union, cemented by blood, be the Union of the Constitution, or a secure foundation for national glory and greatness? Could it be followed by a real peace, and how long would it endure? Would not the National Legislature be a scene of discord, if members from conquered States formed a part of it? Would not these States find multitudes of sym-

pathizers and friends in the others, and immediately endeavor to make alliances with them and with foreign nations, in order to renew the contest? And how long would it be before the flames of war were again kindled, to burn with wider scope and hotter fury? The American people desire no such Union. If they cannot have one founded on consent and mutual good will and common interests in a common destiny, they would rather give up their cherished hope of a great Republic, and accept the destiny of Europe.

For these reasons it may be confidently assumed, that the people would not refuse a just demand for separation, properly presented. But there must be a tribunal to decide upon the merits of such a case, and to settle the terms of separation. This tribunal is the General Government, representing all the States and the whole people, for there can be no other. It alone, by refusing separation where it ought to be refused, or granting it where it ought to be granted, could save still a Union and avert the calamities of war.

Assuming that the majority of the States and of the people represented in the central Government have the constitutional power to preserve the Union, or to consent to the separation from it of one or more of the States, does it not follow that the Government has also a right to decree a separation from one or more of the States against their consent? Must not this right exist in order that the Government may be adequate to the exigencies of the Union? Must not power as extensive be vested in every government, to enable it to perform the duty of preserving the nation, and of promoting its happiness and perfection? The rights of a nation spring from its obligations. "It has a right," says Vattel, "to everything, without which it cannot obtain the perfection of the members and of the States, or prevent or repel whatever is contrary to that double perfection."* This principle is not inconsistent with another he had just laid down. "If a nation is obliged to preserve itself, it is not less obliged to preserve all its members. The nation owes this to itself, since the loss of one of

* Vattel's Law of Nations, B. 1, ch. 2, § 23.

its members weakens it, and is injurious to its own preservation. It owes this also to the members in particular, in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage; and none can justly be deprived of this Union, and of the advantages which flow from it, while *he on his side fulfils the conditions.* The body of a nation cannot, therefore, abandon a province, a town, or even a particular person, who *has done his part,* unless obliged to it from necessity, or unless it is made necessary by the strongest reasons founded on the public safety."*

These are universal truths. They are thus a part of the Law of Nations. Let us apply them to our case. It is obvious that a State may refuse to fulfil or may be unable to fulfil the conditions of the Union, or to do its part in it. The preservation of the majority or of the "body of the Nation," its progress in civilization and power, in perfection and happiness,—in all good, worthy, and noble things,—may, therefore, demand separation from an incompetent, a vicious, a diseased, a decaying, or a dead part. The majority must decide such questions. It is the universal rule of all States that the majority must govern, for "otherwise it would be impossible for the society ever to take any resolution."† The rule does not always work well, for sometimes the opinion of the majority is by no means the wisest. Nevertheless, the rule is necessary; for when the assent of more than a majority is required, power is thereby transferred to a small minority, whilst Polish unanimity is destructive to all the ends of Government, as the fate of Poland proves.‡

A nation has a right to everything essential to its safety and well-being. This nation has a right to a Union consistent with its security, liberty, and progress in civilization. It has exercised power over the Union from the beginning. The Constitution provided that its ratification by nine States should

* Vattel's Law of Nations, B. 1, ch. 2, § 17.

† Vattel's Law of Nations, B. 1, ch. 2, § 33.

‡ On the injurious consequences of requiring a vote of more than a majority for deciding a question, see Federalist, No. 22.

be sufficient for its establishment between those States. The Convention had power to fix upon a smaller or larger number, and to exclude forever the two States which at first refused their assent. The Convention might have excluded the States that refused to give up slavery or the slave-trade, and fortunate indeed would it have been had they done so. The Constitution declares that new States *may* be admitted into the Union by Congress. All this shows that a majority of the States did exercise control over the size of the Union, and may, by express legal provision, limit the increase of it. There is no power expressly given to preserve the Union, or to dissolve it by mutual consent. These powers are implied from the general language of the Constitution, and from the universal principles that lie at the foundation of all Governments.

The Constitution intended to grant to the Government authority "adequate to the exigencies of the Union." We have seen that those exigencies may require either the preservation of the whole Union as it exists at any particular time, or the separation of some of the States by consent of the majority. The separation of one or more without or against their own consent, may become equally necessary. The Union ought to be such as the majority of the people choose to make it. It will be such in spite of all narrow constructions of the Constitution. This was at its origin the law of its being, and will be so hereafter, unless it shall close its life amid the convulsions of anarchy, because that law is resisted. The only right of secession consistent with peace, safety, and national existence, is in the majority.

That a State may be expelled from the Union will be to many a startling and unwelcome proposition. Yet the right of expulsion must belong to all associations, whether for pleasure, for business, or for government, because it is essential to their comfort, their character, their safety, and the attainment of their objects. No view of the stormy future that lies before us is more painful or more certain than the truth, that some States and sections of this country may become unfit companions for the others, unfit for equality with them, and

unfit to influence or control their interests by a share in the central power.

Let us take, by way of illustration, the Territory of Utah,—not yet a State, indeed, but likely soon to apply for admission into the Union. Considering that this is the nineteenth century and America, Mormonism is a remarkable phenomenon. That a despotic theocracy should grow up and flourish under the sheltering wings of the great Republic is scarcely more surprising than that polygamy, an Oriental institution, should have been successfully transferred to our extreme West. The one contradicts every principle of our Government, the other takes away a chief pillar from our fabric of Christian morality. Both are inconsistent with the manners, the convictions, the culture of our people, and their system of political and social civilization.

Mormonism numbers from 250,000 to 300,000 followers. There are 80,000 in Utah, its chief seat, and the residence of its Prince and Prophet. Strange to say, he is a New England man by birth and education, as are many of his subjects. He unites the character of priest and despot, and displays ability as both. His emissaries are spread abroad over America and Europe, engaged, like the Jesuits, in the work of propagandism. The number of his converts increases, and from the great tide of Western emigration, annual rivulets diverge into Utah. The Saints, notwithstanding their gross superstitions and their oriental customs, display the Saxon aptitude for material progress and social combination. They maintain order and government, they excel in the mechanic arts, they build towns and cities, and have created a flourishing agriculture. They have the boldness, the energy, the arts, the knowledge, the mind of the Northern races. Add to these qualities the electric power of fanaticism, the concentration of despotism, and they are not to be despised. They are capable of strong and persistent efforts, whether in peace or war. Some believe that they are destined to multiply and to become a great people; others that contact with our civilization will weaken and destroy their faith and reform their habits, and that they will be merged into our population as it advances westward.

However that may be hereafter, Mormonism is now a fact of practical importance. Shall Utah be admitted as a State? Shall it have two votes in the Senate? Shall polygamists, and the subjects of Brigham Young, and the sectarians of a monstrous superstition, help to make a President for us, and share in the authority that rules the interests and destiny of this rich, educated, and civilized nation? Have the American people no power to avoid the contamination of such a fellowship, or the degradation of such a control? Surely it is one of the "exigencies of the Union" to refuse companionship with pagans and polygamists, with the deluded followers of an impostor, and the blind worshippers of an absurd faith. The animating principle of our Constitution is liberty, and they are the abject slaves of a despot. We have built our house on the rock of Christianity, and they are the idolaters of falsehood. They cannot participate either in our religion, our liberty, or our civilization, and are unable to share our destiny or our hopes. Yet the impudent claim of Utah to be received into the fellowship of the Union has many advocates. Strict constructionists interpret the word "*may*" used in the Constitution to mean "shall;" but reason and common sense read it as it was written, and in accordance with the eternal laws of man's nature.

The country, however, presents other cases more difficult than that of Utah. Mormonism, when no longer upheld by the talents of Brigham Young, will probably decline, and gradually disappear. It is nourished by no perennial fountains springing from the qualities of race, the traditions and customs of the past, or the interests of the present. All these influences oppose it, and it is scarcely possible that it should resist the force of example, the light of civilization, and the current of opinion, when these reach the distant region where it is seated. We should let it alone for the present, and wait the indications of the future, satisfied with this,—that the union of Mormonism with liberty and Christianity is unlawful, unholy, and impossible.

So also is a permanent union impossible between civilization and barbarism, between a growing and advancing people

and one decaying, between vigorous health and chronic disease, between knowledge ever seeking new light and ignorance preferring darkness to light, between strength always aspiring to new achievement and weakness declining to lower and lower depths of contented degradation. Civilization and progress depend on the qualities of race. Some races are incapable of advancing beyond the savage state; such are the North American Indians, the inhabitants of the tropical islands, the aborigines of Australia. Others reach a certain point of material, utilitarian improvement and there stop, as the Chinese, the Japanese, the Mexicans and Peruvians. Others have a limited capacity for amelioration whilst guided and sustained by the superior mind of the white race, like the negro. Civilization in its true sense, which includes moral, intellectual and material advancement, literature, the useful and the fine arts, free government and Christianity, belongs to the white race, and to its branches in very different proportions.

Of these the Teutonic is now generally admitted to be the highest type of man. It alone is capable of maintaining liberty combined with order, of the mechanical inventions and applications which control the forces of nature and supply the means of comfort and refinement, of constant aspirations and constant efforts for a better and higher life. The North, as it was the birthplace, is also the congenial home of this highly endowed race. It does not flourish in the South. Whether, as some think, because of the climate, or according to others, because of contact and intercourse with the dark races of the South, when transplanted there it dwindles and decays, loses its energy, its aspirations, its industry, its powers of progress and love of freedom. It exhibits a constant tendency to sink to the Southern level, to become merged in the Southern races, and can only be sustained above and separate from them by connections with the North and fresh supplies of Northern force and ability.

Without entering into the discussion of ethnological theories, it may be said that science, history and the present aspect of the world show that the laws of nature separate mankind into different races, distinctly marked by per-

manent characteristics, and that to these races have been allotted different portions of the earth. The laws of nature execute themselves, and this ranking of races and division of territory is guarded by inexorable penalties. Hybrids are not prolific and are deficient in the strong qualities of either parent source. The food and climate which nourish one race are injurious to another. The wants of each are satisfied, its qualities developed, its energies active only in its appropriate sphere. The contact of any two is injurious to both. The result is subjugation of one or the other, amalgamation and degradation. This is more especially the case with the four great and more strongly marked divisions, the white, the black, the yellow and the copper-colored. Their natures are dissimilar and have been so in all that we know of the past. We may presume that they will be so, in all that we can know or can provide for of the future.

Let us leave theories or rather apply them to practical interests. It is evident that we have not merely a geographical North and South. We have a Southern climate and we have the black race. We have the sun and soil suited to that race, and therefore it is here. It grows and thrives in the South as it does in Africa. It was taken to the North, but did not flourish there and hastened constantly southward, where it is concentrating its dusky millions. The Saxon grows and thrives in the North. He too has gone to the South. Does he flourish there? Does he expand to the full capacity of his nature? Does he advance in his appointed path to higher and nobler destinies? Does he send forth luxuriant branches covered with the blossoms and fruits that he was born to produce, science, arts, liberty, wealth and refinement? Gloomy statistics answer these questions. When the thirteen original States sat in convention and made the Constitution, there was no great disparity in the condition of North and South. Look at them now. They are far asunder. Between them is the ever widening gulf that separates advancement from stagnation and decay. Where are the commerce, the manufactures, the improved and productive agriculture of the country? Where the great cities, the flourishing towns filled with wealth and

luxury and adorned with taste? Where are the ships and mills and machinery, the fertile and embellished farms? Where the colleges and schools, the galleries of art, the churches and charities? Where the publishers, printers and the influential press? Where the authors, the painters and sculptors? These things constitute civilization, and they are all in the North. Why? The answer is twofold and plain enough. The Saxon cannot labor in the South, and these things are the products of labor. The negro can labor there, but he cannot make these things.

Consider the immense significance of these two facts. Is not work of the body and of the mind man's chief blessing and mission in this world. What is it that brings order out of chaos, that makes the earth habitable, that surrounds life with ease, comfort and beauty, that supplies intellectual wants, and cultivated taste, but work? And is not idleness the parent of every vice? The white man cannot work in the South; that is to say he does not love work. The climate indisposes him to labor, and he will not work whilst he has the negro to work for him. The industry of the South is therefore in the hands of a race incapable of civilization. How much is implied in that! Industry is rude and coarse. There is no mind in it, no invention, no intelligent use of the forces of nature and adaptation of means to ends. The countless productions of skilled labor therefore, which constitute material civilization, do not belong to the South. They are taken there from lands where industry is mental as well as physical. The South cannot convert its cotton into the beautiful and useful fabrics that clothe the world, cannot make the machinery to weave it, could not use that machinery, cannot build ships to carry its rude products away. It does for cotton what the natives of Africa do for it, and no more, and for the same reason. The Africans in Africa can only grow it; the Africans in the South can only grow it. Almost the whole value of the cotton crop was created by the cotton gin, invented by a Northern man.

The labor of the working race of the South brings with it none of the blessings of labor. It is not only ignorant and

rude, but it is not accompanied by self-respect and stimulated by hope. The laborer cannot aspire, cannot respect himself, for he is a slave. He is not a citizen or one of the people; he has no country, no government, no laws. He could not have them if he were free. He never had them in Africa, he will never have them here. He is planted irrevocably in the South, I mean in the extreme South, the Cotton States. Never, therefore, in the South can the word industry mean what it does with us. It can never be associated with ideas of ingenuity and skill, of knowledge and intelligence, of constant progress and general comfort, more and more widely diffused among the people. Take from the North our laboring class and substitute for them the negro, whether free or enslaved, and how soon our onward career would be checked. What a mass of mind and energy, what lifeblood, would be taken from our social system! What would become of our mills and workshops and well-tilled farms, of our busy villages and rising cities? These things must exist in the mind of the workman before they can be produced by his hand.

Not only can there be no respectable laboring class where labor is in the hands of an inferior race and of slaves, and is therefore despised, but there cannot be the large and prosperous order which goes by the name of the middle classes; master workmen, machinists, builders, farmers, tradesmen, manufacturers,—educated, active, enterprising and rich; the men who direct the great business and control the great interests of the country. Diversified industry produces and sustains these. Without commerce and manufactures they cannot exist. Without skilled and intelligent labor they cannot exist. Give them slave labor or negro labor as a support and they would disappear. Take this class from Northern society and its prosperity and power would wither away.

What, then, are the elements of Southern society? An idle white race, dependent on the labors of the negro, the negro himself, and a third class known as "poor white trash," rapidly increasing. All white men cannot own land and negroes, cannot be planters, merchants, doctors and attorneys at law. There must be large numbers that in some way or

the other live by physical labor. But physical labor is despised, and there is not much demand for it. Capital is the employer of labor, and capital in the South owns its labor. The productions of skilful industry are brought to it in the ships that take away its cotton. The demand for ingenuity, for thought in labor, is small. Mere bodily toil is demanded, and that is supplied by the negro. If the white man works therefore at all, he must work like the negro, with his body only; he must be contented to live as the negro lives, he must be the competitor of the negro, and, so far as his nature can, sink to his level. And such has been his fate. The words "poor white trash" are a term of contempt, even in the mouths of slaves.

And the ruling class, the planter, the professional man, the merchant of the towns, supported by cotton, what has been their fate? Do they flourish? Do they rise higher and higher in knowledge and refinement? Are they enterprising, adventurous, energetic? Are they creating a great empire at the South, durable and strong, advancing in science and wealth and embellished by art? Are their cities and towns growing in size and beauty? Do churches, colleges and schools multiply? Who are their philosophers, poets, painters, and men of letters? Is not even their breed of statesmen extinct? At every generation they lose some of the high qualities of their blood. Born to command an inferior race, with the persons of men and women subject to their absolute power, they are educated to arrogance, pride, sensuality and cruelty. Their wealth is exotic. It is not the result of their own thought or skill, but of the rude labor of those who are not ranked among their people, and of foreign skill. The whole value of their chief production is given to it by other hands. Destroy their monopoly of cotton and they would be poor. They are becoming incapable of free government. Free thought, free speech and a free press, are inconsistent with slavery. To govern the negro they must govern also the non-slaveholder, and oligarchy supported by military power must ere long supplant republicanism.

It is impossible to resist natural laws. The Saxon race

does not belong to the South. Liberty, labor, progress, are essential to his healthy life and growth. He is really an alien in the South, which to the negro is a congenial home. The climate and the negro, therefore, unite to destroy the white race. They enfeeble and degrade it. Such has ever been its fate, sooner or later, where it has attempted to colonize the South. The dark races, assisted by the sun, are more than a match for Northern energy.

Now what is the practical bearing of these truths on our affairs? We have four millions of negroes in the South. They are there forever. They cannot be sent away. It is a congenial home for them, where they thrive and grow and where they have founded a new Africa. They increase faster than the white race. Soon they will be eight millions, ere long sixteen millions. The population of mixed blood also increases. A wide-spread degradation of race threatens the South, a mingling of races and colors, like that which has ruined all hope of civilization in South America. Nothing sustains the Saxon race in the South now but the high price of Southern productions, a support that new fields of supply or the discovery of another vegetable fibre may at any time destroy.

Already the climate and the negro have created a vast disparity in all the elements of civilization between the North and the South. Already they have in the South converted a large portion—a majority—of the Saxon race into "poor white trash," and are rapidly dragging the others into a slough of sensuality, ignorance and sloth. Already they have destroyed free government, and have checked the growth of industry, science and the arts. The North will not pause in its career. As Africa increases its empire in the South, the difference between the two sections must become more clearly marked. At length a point must be reached when union on equal terms will be impossible. Africa means barbarism, and there can be no union between civilization and barbarism. A mixture of races, composed of negroes, mulattoes, quadroons, degenerate Saxons, Spaniards, French and Mexicans, means degradation, decay and death,—the extinction of national life, of

all elements of strength and progress. Union and equality with such would be for the Northern people impossible as they would be with the people of Mexico or Venezuela.

A degenerate race cannot be permitted to govern the North and to decide for it the great questions of national policy. There can be no equality between parties unequal by nature. There can be no fellowship between persons different by nature. There can be no joint ownership that would destroy the thing owned. There can be no government by an inferior over a superior. Barbarism cannot share the destiny of civilization. Vigorous and healthy life will not be bound to disease and decay.

As the negro and the climate assert their power over the white race in the South, its hold on the North must gradually be loosened, even should the Union be restored after the present war. A time must come, therefore, when one of two things will happen: either the Southern States, that is, the Cotton States, will be excluded from a share in the central power and be governed as subject provinces, or they will be excluded from the Union.

Justice will demand this, because they will not be able to perform their part in the Union. The security, the prosperity, the freedom of the majority will demand it, because these States, if the causes already mentioned continue to operate, by sharing in the central authority, would corrupt and destroy it.

Clearly, therefore, such a change may be required, and unless the Government has the power to make it, it cannot be "adequate to the exigencies of the Union."

I have thus endeavored to show that history, English analogies, the fundamental principles of all politics, and the language of the Constitution, prove that the central Government, representing a majority of the States and the people, has legal power over the Union, to preserve it, and to limit, extend or diminish its size as justice and necessity may demand. If the

right to this power be doubtful, the present crisis proves that it is necessary, and that only by the prudent, just and determined exercise of the whole of it, can a Union worth having be saved and anarchy averted. The Government must take the power and must be sustained by the people or we perish. It belongs to the Government by eternal laws which cannot be violated with impunity. A nation has a right to whatever is necessary for its preservation and progress, and we, the people of 1862, have a right to such a Union as is consistent with our safety, civilization and happiness, whatever our ancestors of 1787 may have thought or said.

When they set about the task of saving the Union, they found it in imminent danger because the States had too much power, and the central Government too little, or rather none at all. Accordingly they created a National Government with authority to make and execute *supreme* laws, to impose taxes, to maintain an army and navy, to declare war, to make treaties, to perform, in short, all the usual functions of a Government acting upon persons and property. At the same time they prohibited to the States every power deemed inconsistent with such a Government. They did not declare expressly that no State should have the right to overturn that Government, or to destroy the Union it was intended to preserve. A declaration of this sort would seem superfluous, because such a privilege would be inconsistent with the very purpose for which the Constitution was made. To say that the object of the Constitution was to create "a more perfect Union" and then that the Government had power to preserve it, to declare that Congress had authority to make laws and then that these laws must be obeyed, was unnecessary, and would not have accorded with the comprehensive brevity appropriate to such a document.

Nevertheless it is unfortunate that a clause to this effect was not introduced, for the perverse ingenuity of faction has discovered that the Government has no power to preserve itself and the Union, because none was expressly granted. The gross absurdity of such a doctrine has not prevented its becoming the basis of a powerful party, that claims for any

State, the right, at its own will and pleasure, to set the Government at defiance, and without the consent of the other States or consultation with them, to destroy the Union. The advocates of this theory go even further. Not content with claiming for a State the right of separation, they contend that by reason of such an act, the legal tie which binds the others is severed, the central Government annihilated, and each State at liberty to form such combination as it pleases. Not only may a single State withdraw, but at its bidding the Union can be broken into as many pieces as there are States, whatever the wishes of the people. When thus broken it cannot be reunited, save by another convention to make another Constitution.

These are principles not of Government but of misrule, not of life but of death, not of union but of discord. One of their fruits is this Southern rebellion. These doctrines have many Northern advocates, friends of the Southern rebellion, and unless rooted out with a determined hand, anarchy in the North will be another of their fruits.

We thus find ourselves in the position of our fathers in 1787. .We are threatened with anarchy and disunion, because central power is too weak and local power too strong. We must apply the same remedy which they applied: strengthen the General Government and enforce the obedience of the States. We need not for this purpose make another Constitution. That which we already possess, liberally construed, is all-sufficient.

The present rebellion has a twofold character. It is an attack on the dignity and authority of the Government, and it is an effort to destroy the Union between the Southern and Northern States, and between all the States. The war made by the Government has therefore a double purpose: to assert the majesty and legitimate power of the Government, and to preserve the Union.

The Southern people have injured their cause by the manner in which they have exercised their pretended right of secession. Granting for the sake of argument that right, it is an ungracious act at best to withdraw from the Union. It necessarily implies injury to the interests and the feelings of the

other States and dissatisfaction with the Government. It implies loss of power and territory to the nation. When coupled with the doctrine that the withdrawal of a State severs the tie that binds the others together, the right of secession implies the right to utterly destroy the nation and its Government. These are high powers to be exercised by a single State, or even by a majority of the States. Is it unreasonable to expect that those who use them should do their spiriting gently? Are the States whose Union with each other is to be thus sundered against their will, and whose interests are to be sacrificed,—is a Government which is to be thus suddenly extinguished,—is a great nation which is to be in this summary manner blotted out from the world's roll of nations,—are all these momentous concerns, and the deep feelings connected with them, and the profound attachments they inspire, and the large hopes that hang upon them, entitled to no consideration, no comity, no courtesy? A haughty demand and a haughty threat;—must the Government abdicate its power, and the Union fall to pieces before these, like the walls of Jericho at the blast of Joshua's horns?

All rights known to the law have some formal and orderly manner appointed for their assertion, all, it seems, except this right of secession. It may be preceded by secret conspiracy and official breach of trust, may be veiled by lying professions of loyalty up to the moment of action, and may be announced by words of insult and deeds of violence and outrage. Such crimes cannot accompany the exercise of any legal right or be authorized by any law. When the leaders of Southern politics covertly stripped of its defences the Government of which they were the sworn officers; when they seized the forts, arsenals, mints, ships, and all other property of the nation on which they could lay their felonious hands; when they openly enlisted armies and when they fired on our flag, they abandoned the right of secession. They instantly made another issue between themselves and the Government in which that right had no part. They raised another question, involving interests, compared with which the loss of all the South was not worth a moment's thought. They cast off the character

of representatives of States, making a claim which, whether legal or illegal, might be reasonable and just, and if respectfully urged, was entitled to a respectful consideration, and became criminals, whom it was the duty of the Government to punish. They proffered to the Government not legal demands to be discussed, but rebellion to be resisted at all hazards, and whether the claims were legal or illegal, just or unjust. They insulted the other States by disregarding their interests, opinions and wishes, by defying the authority of their Government, and by outraging their flag. What has the right of secession to do with such a case? Granting that its magic touch obliterates the Government, and breaks the Union into fragments, surely the Constitution must have intended these dismal results to be brought about in some way consistent with order and law, with the honor and self-respect and ultimate interests of the people. It is impossible that Washington, Hamilton, Jay, Dickinson, Franklin, and the other founders, meant to justify sedition, conspiracy, treason and rebellion, or to create a Government without power to resist these, and whose duty it is to vanish at their bidding; or that they intended to make a Union with no judgment, no will, no power over its own destiny, but which may be suddenly plunged into anarchy at the command of one of its own members. The Confederation was a helpless Government and a loose Union; but a Government that cannot draw a sword to resist armed violence, a Union that must dissolve at a threat, as snow melts at the touch of fire, would be weaker even than the Confederation, and more contemptible.

When the Government was thus sommoned by an armed rebellion to abdicate its authority, Mr. Buchanan was the President. Neither he nor his Attorney-General could find in the Constitution any power to make war upon a State, so they said, and accordingly the President did virtually abdicate his authority, for he refused to exercise it, though he remained nominally in office to the end of his term. When Mr. Lincoln came into power, he discovered a clause which told him that it was his duty to "take care that the laws be faithfully executed," and another, which declares that to "levy war"

against the United States, or to "adhere to their enemies, giving them aid and comfort," is treason. He remembered, moreover, that he had taken an oath "to preserve, protect and defend" the Constitution, in which his duty was thus clearly laid down. As the laws act directly upon persons and not at all upon States, he probably thought,—if he thought about a distinction so frivolous,—that to execute the law upon persons was not making war upon a State. He knew that levying war against the United States was treason, and not less so, because the guilty parties were Governors of States or members of State Legislatures or conventions. He knew, also, that it was his province to defend the property of the nation from all hostile aggressions, that to enable him to do so, he was Commander-in-chief of the Army and Navy.

Mr. Lincoln, therefore, refused to abdicate. He could see no right of secession in treason and rebellion. He could see nothing but a crime to be punished and an attack to be resisted. Military force became necessary to execute the laws and he employed it. The contagion of the rebellion spread over a great section, and its ranks swelled into a powerful army. Congress put a large army at the disposal of the President. These armies have met on many a bloody field, and a contest between great armies is war. A contest between a Government and a large portion of its people is civil war, and such is this now raging in our country. It is not a contest between the Government and the States. The authority of the central Government acts not upon States, but upon individuals. That is the chief difference between it and the old Confederacy. A State cannot be guilty of treason or rebellion. Traitors and rebels are not corporations, but men, and as such amenable to the law.

The primary object of the war, therefore, is to vindicate the outraged dignity and honor of the Government, and to maintain the authority of its violated laws. Unless it can do this, it must lose caste and character as a Government, confidence at home and reputation abroad. A Government that is defied and insulted with impunity, that yields to threats and makes concessions to armed rebellion, has no right to exist,

cannot indeed long exist. It is sick with a fatal disease, has no longer any useful part to play among the living, and the sooner it dies and is shovelled away out of sight the better. A Government without power is a sham and a lie, and the question which the Southern people presented to the Northern was, not shall we withdraw from the Union, but shall your Government become a sham and a lie,—a very different and far more serious question. It would be a misfortune, no doubt, to lose our Southern territory, but that loss would be a trifle compared with the ruin of having no Government, or the mockery of a Government, that could not protect itself or the nation, or command obedience or inspire the feeling of security at home or respect abroad.

Mr. Lincoln answered the question thus audaciously put by the leaders of the rebellion. He declared that the Government of the United States still existed, and he announced the fact to them and to the world in resounding cannonades, whose meaning is plain enough. What they say is, that the laws must be executed in Charleston and Savannah, and Richmond and New Orleans, in order that they may have authority in Philadelphia and New York, in Chicago and San Francisco; that our flag must fly again at Fort Sumter, that it may be honored on the high seas and in foreign ports; and that when this Government discusses the right of secession, it will not be with secret plotters of treason and armed rebels to its authority.

The right of secession has therefore never been presented by the South to the consideration of the Government or of the Northern people. Whilst loudly asserting it, the South have not depended on its legality, but have resorted to other means, so destructive, that the issue was necessarily made upon those means. Neither has the South presented a case for the dissolution of the Union between them and the other States, by mutual consent. Had Southern members of Congress, like the Scotch members of Parliament in the instance already referred to, brought in a bill to dissolve the Union, the merits of the claim might have been discussed, and the debate would have brought out the real sentiments of the country North and South. Was the Union a burden and a misfortune to the

South? Had the rule of the central Government been unjust and oppressive? Were the well-ascertained opinions of the Northern people in relation to slavery such as endangered the safety and the interests of the South? Was there a probability of a Southern Confederacy being established that could maintain its independence as a nation? What injurious consequences would the separation cause to the North, and could they be avoided? Above all, what were the wishes and calm, deliberate judgment of the Southern people on the subject, and in how many of the States did they really desire separation, and by what majorities?

These and other important questions would have been duly considered. Had they been answered favorably to the claim, with no means of satisfactory adjustment possible, it is not hazarding much to say that the demand for separation would have been yielded. It would have been asking indeed a great deal. It would have been asking Northern manufactures to give up a right to the cotton crop without impost or restraint; Northern commerce to give up the control of the Gulf coast; the Northwest to give up the free navigation of the Mississippi and the command of its outlet, and the Northern people to give up their undivided share and interest in vast and fertile regions. It would have been asking a nation to diminish its power and resources, and to permit the establishment on its border of another nation who might become an enemy, who could make alliances with its enemies and defeat its tariffs.

All this would have been implied in a demand for Southern independence. Nevertheless, had it been in itself reasonable and just, and had it been made with due deference to the sentiments and interests of the North, so strong is the love of Americans for State power, so universal their conviction that a people has a right to choose or change their government at will, that most probably such a demand, so made, would not have been rejected. If rejected, the position of the South would have been much better than it is now. Even now it has partisan friends and allies in the North. In the case supposed these would have been a host. Even now it has many sympathizers in Europe. In the case supposed foreign sym-

pathy would ere this have caused recognition of Southern independence, and active aid to secure it.

But in truth, the cause of the South had none of these merits, and the conspirators did not dare submit it to the scrutiny of the nation or to the calm judgment of the Southern people. They had suffered no real grievances. So far from having been oppressed by the central Government, they had almost always controlled it, and were very likely to control it again. At the very moment of the rebellion they had a majority of the Senate and a powerful party of allies in the North. The Union was a benefit to the Southern people. Under its guardian care, its one supreme and cherished institution and its chief staple grew and flourished with immense annual increase. The Union and Northern opinion were the protectors of slavery,—its only protectors against the enlightened spirit of the age. The Cotton States could not maintain themselves as a separate nation, half African as they are, and without manufactures or commerce, but would become a dependency of some European power. More than all, the Southern people did not desire separation. They appreciated the value of the Union, and the majority in every State, except South Carolina, had a free expression of opinion been permitted, would have rejected the proposal to secede from it.

But this was not permitted. All the arts of practised demagogues were employed to prevent it. Inflammatory harangues, boundless falsehood, ceaseless agitation, the influence of a dominant class and of prominent men, were actively exerted without success. Official authority disregarded the wishes of the people, and conventions instructed to vote against secession voted for it. When the deed was done, and when war was the result, then the passions generated by war, more especially in an invaded country, arrayed large numbers of the people against the Union. The masses of the South are ignorant and poor. They are easily deluded and easily led. They are accustomed to the guidance, often to the arrogant dictation, of a small class. What may be their opinion now, how far the expression of it may be restrained by a revolutionary govern-

ment, and how far their apparent adherence to the rebellion is real, cannot be known.

As secession has neither law nor merit to support it, the Government and the Northern people must treat it as a rebellion to be quelled and an attempt to destroy the Union to be resisted. Another object of the war, therefore, is the preservation of the Union.

This view of the subject is so full of difficulty and danger, that all thinking men must regard it with dismay. Broken Unions are not easily restored. They are like pitchers broken at the fountain. Broken marriages, broken friendships,—how can they be again cemented with the old love? "A brother offended is harder to be won than a strong city, and their contentions are like the bars of a castle." Is the Union one of parchment only? Does it depend wholly on the Constitution, and on cunning adjustment of central and local power? Are not these weak, when moral bonds are wanting,—sympathy, similarity of manners and taste, a common interest, common objects and common hopes? And have not these been long wanting between North and South? Seven years of war followed the severance of the union between our ancestors and England, and then it was not restored. The first gun fired at Lexington broke it forever. The Convention that met in 1787 made a Constitution "in order to form a more perfect Union," not to mend the broken links of one that had been severed. There had been no war between the States,—no battle-fields, sad records of fratricidal bloodshed and sectional hate.

Perhaps the Union cannot be restored. The South has shown unexpected force and unity and military skill. It has been victorious in many combats. It may be assisted by European intervention. The North, notwithstanding its great resources and superior strength, may yield the boon of independence, as England did, rather than encounter the losses and dangers of a long war.

Perhaps the rebellion may be crushed and its armies dis-

persed, yet the Southern people sullenly refuse to return to the Union and participate in its government; or they may return unwillingly, with simulated loyalty and reluctant obedience, discontented, ever ready to revolt again, a source not of strength but of weakness, and more than ever a divided people,—a Poland, a Hungary, a Venetia.

May not the Northern people say they desire no such Union, no such companionship; that the Union they require is one of consent and mutual good will; that they will not live on equal terms with those who hate them, or meet them as representatives in a common Government?

In either of these cases, where is the line of separation to be drawn? Is it to include in the South the Cotton States only, or the border Slave States also, or some of them, or parts of some of them? A most important question for the North, for on it depends whether we shall have for a neighbor and probable enemy, a weak or a powerful nation.

Another question still more important is, who is to draw the line of separation, for that will probably determine, whether the country is to be divided into two or into many nations. A united North would make a great empire, rich in all resources, full of life and vigor, strong enough to defy the world. But an East, a West, a middle region, and a South, would be weakness for each and perpetual war. Who is to settle that question? The States themselves, as such, or a convention of the States? Either plan would recognize the right of secession, and the false and fatal doctrine, that the Union once broken, as to one State, is broken as to all. Either plan would unsettle men's thoughts, inspire universal alarm (for none could know what the others would do), and give free scope to the ambitious designs of demagogues and the insane rage of party spirit. In such a crisis, a National Government, strong enough to make itself obeyed, is the only rock of safety; it alone can inspire confidence and save the country from anarchy. The Government established by the Constitution has power adequate to the occasion. It has power to preserve the Union, the legal Union, the Union seceded from and rebelled against, the whole of it, or as much of it as can be held, or as the majority

of the people choose to have. It alone can draw the line of separation, and defend it when drawn. It alone can secure a prosperous and united North. Give this power to the several States, each to decide for itself, as hopes and fears and partisan intrigue and popular passion may dictate, and the fate of continental Europe will speedily be ours.

Already the dangers of such a plan have been foreshadowed by the course of the Democratic party in Pennsylvania, so early as January, 1861, in anticipation of the war not then begun. Even then the leaders of that party passed a resolution, to the principles of which they have since adhered, declaring that in the event of separation, Pennsylvania ought, and *legally might* join the Southern Confederacy. Grant such a right, strip the Government of power to preserve the Union after the separation of a State, and what a chaos of ruin would follow, should the rebellion accomplish its objects. We are wont to talk of the weakness of the South; but all the nations of the world combined could not destroy us so completely as the South may, should these monstrous doctrines be carried out to their practical results. This, indeed, may well be a war to preserve the Union, if such are to be the consequences of disunion.

Perhaps the Northern people may choose, and may have the power to preserve the Union against the wishes of the South. They may determine to conquer the South, and to hold it in subjection by military force. They have offered to the Southern people from the commencement of the war, peace, good will, and their former equal and honorable position under the Government, on the sole condition of laying down their arms. Wherever our armies went they have proclaimed that they came to preserve, not to destroy; that they did not make war on the people, but on the rebellion. Private property and non-combatants have been respected, even slaves escaping to our camps, have been returned. This offer has been spurned with scorn, these words and acts of kindness have been repulsed with every expression of malignant hate. Our good will has been met with curses and execrations, even by the women.

The Northern people are not very excitable. They are slow

to anger, but they can be moved to anger, and then their rage is not easily appeased. They prefer peace to war, but they love war and its excitements, which develop those qualities that make their race everywhere conquerors; courage, adventurous energy, stubborn tenacity of purpose, love of supremacy and power, "an indomitable rock-made race of men," descendants of Hengist and Horsa, of the Norsemen and Sea-Kings, who conquered the Celt in France, England, Scotland and Ireland, and held him conquered, overturned the Roman Empire, and spread havoc through its ancient cities, and here, for want of other opposers, have conquered the primeval forests, and founded an empire on the home of Indian tribes. Perhaps these Norsemen of America may say, "This Southern country is ours by right, and we will have it, in its length and breadth, with its coasts and cotton, its rivers and ports; it is ours, and it shall be ours, if we must make it a desert. The Southern people hate us, defy us, make war upon us. We accept their challenge, and will treat them as enemies. They reject the Union, will not live with us in the Union. Be it so; we will reject them from the Union, but still hold their country. They call us abolitionists. We accept the title, and will abolish slavery, or anything else that stands between us and our purpose. They have attempted to destroy our Government. We will make them, not its citizens, but its subjects."

This would be a Gothic way of settling the controversy, and the Gothic nature is not extinct, however softened and refined by culture and civilization. The old Norse temper survives and shows itself on occasion. What would the English people do in like circumstances? Would they give up territory to a threat? Would they palter and argue, and negotiate with a causeless and wicked rebellion, or offer concession and compromise in return for insults and blows? Would they suffer their Empire to be dismembered for the sake of slavery, or permit an enemy to exist within its rightful limits, where, if they could not have a friend they might have a dependent? Would they give up Ireland? They conquered it, and have held it conquered through centuries of war, and more than

once well-nigh exterminated its inhabitants, rather than give it up. Would they give up Scotland? Through long centuries they made incessant efforts to conquer the Scotch, efforts which ceased only when their object was accomplished by the Union. Did they give up us? Rather than do that they fought us for seven years, across three thousand miles of ocean. Would they give up India? It was only the other day that they tied seceding Hindoos before the mouths of cannon, and blew them into fragments. The Norse blood beats yet to its old tune under the silken vesture of the nineteenth century. This stern deed was done by gay and graceful officers, of gentle birth and cultivated manners, the "curled darlings" of London drawing-rooms. When the news of it reached home, civilized, humane, lettered and Christian England muttered hoarse applause.

Whether we are to have Union or disunion, and on what terms, whether we are to be one nation or many nations, no one can predict. Who can foresee the results of such a war? Who can foresee the many difficult questions that may grow out of it, affecting even the nature and form of the Government? Who can foretell what direction the rushing torrents of opinion and passion may take or to what changes they may lead? All that we can know is that there will be changes, that we have entered on a new chapter of our history. We are tossed on the billows of a raging sea. Must we strand upon the rocks for want of order and rule? Never before was a National Government so necessary as now,—a Government that can command, can coerce, can be a captain in the storm. We want a Government with ability to grasp the situation of the country, and with undisputed power over the Union and, if need be, over the Constitution. Nothing less than this can save us from anarchy and its consequence, a military despotism. If, because of factious opposition, the arm of the Government is made weak and its authority resisted, then all parties will call for the one man power, and put in its hand a sword; for men prefer security to liberty, will sacrifice liberty for security, and self-preservation is the first law of nature and of nations. Thus have republics al-

ways been destroyed. Reckless party-spirit dividing the people has made impossible a government representing the people, and substituted for it a government beyond their control as the only refuge from confusion. When neither party will submit to the rule of the other, all government must cease, and unless some power arises out of the strife, strong enough to control both, society must cease. In this way anarchy has ever been the blood-red blossom of democracy and despotism its mature fruit.

The people may soon be called on to decide between giving absolute power to the Government or to a military chief. But is it not dangerous, men say, to trust any Congress and President we have had, or are likely to have, with such power,—power over the Union, over the Constitution? Yes, verily, it is dangerous. Yet what is the power of Congress and the President? Is it not the power of the people by whom they are chosen? Can we find anything to trust that would not be chosen by the people? If we cannot trust the people, then, once again, democracy has failed.

It is not, however, a question of what is desirable, but of what is and must be. The Government has the power, not only by the Constitution, but by the eternal laws of nature, which cannot be disobeyed with impunity. No previous crisis has revealed the necessity for such power and its consequent existence. To deny and resist it, will be to destroy the Government and make way for another of a different character, vested with this essential power. This would be revolution; and should it happen, it will not be the first instance of "the loss of a rejected truth, for the want of which whole nations fare the worse."

If the reasoning in this and the preceding chapter be correct, it establishes the following propositions:

The people and the States of 1862, in Congress assembled, have supreme power over the Constitution made by the Convention appointed by the States in 1787, and accepted by the

people, to alter it as necessity or expediency may require. No legal authority exists or can exist by which such action of Congress can be declared void and the people released from their obligation to obey the laws. But any act of Congress is voidable by the people and the States assembled in another Congress, and it is the duty of Congress and of all other officers of Government to maintain the Constitution inviolate, so long as it can be so maintained consistently with the safety and welfare of the nation, and to make no change in any part of it not demanded by necessity and sanctioned by public opinion.

The American Colonies before the War of Independence were members of a Union which was both a confederacy and a nation, viz., the British Empire, but were not represented in its central power.

They afterwards, under the Articles of Confederation, became members of a Union which was merely a confederacy.

By the Constitution they again, as States, became members of a Union which was both a confederacy and a nation, and were represented in its central power.

As the nation is more important than a State, State power must be subordinate to national power. As a nation has a right to preserve itself and to do all things necessary for its progress, well-being and perfection, it has a right to limit, increase or diminish its size; but no State has a right to destroy the nation of which it is a member, or to weaken it or to deprive it of a part of its territory.

The people and the States of 1862, in Congress assembled, have imperial and sovereign power over the Union as it existed before the present rebellion. They have the legal right to maintain it by force of arms if they can, or to relinquish a portion of it if they cannot, or to dissolve it with or against the consent of any part of it, and the people of no part have any legal right whatever to withdraw from the authority of the whole. It is the duty of Congress and other officers of the Government to preserve the integrity of the Union if they can and it be desirable that they should. It is their duty to permit any one or more of the States to separate from the Union, if their people desire to do so for just and reasonable

causes. It is the duty also of the Federal Government to expel from the Union any one or more of the States which, from the nature of their institutions, political or social, or because of the predominance of an inferior race, or of their degraded moral and intellectual condition, or by reason of their inveterate hostility, misrule and insubordination, become unable to participate in the mental and material civilization of the others, unable to appreciate civil liberty and unfit to exercise political power.

In these cases, as in the former, should the Government exercise its power oppressively, the only legal remedy is the ballot-box, which can choose another Congress better instructed as to the wishes of the people, and armed with the same authority to undo what the former had done.

There can be no other legal security against abuse of power except that afforded by the internal structure of the Government and the influence of public opinion. The States are represented by the Senate, the people by the House and by the President; the concurrence of all is necessary to the passage of a law. Each could therefore interpose such obstructions and delays, that before the whole Government could unite in any measures at once unconstitutional and tyrannical, the people would be roused and would resort to all those ever-ready instruments by which intelligent opinion, under free institutions, makes itself heard and obeyed. The State Governments would remonstrate and threaten, the press would pour forth its daily torrent of argument and invective, the machinery of at least one party would be put in requisition, and popular assemblies, in town and country, would speak in tones that could not be misunderstood and could not be disregarded, because they would announce beforehand the result of the next election.

These afford a better security than the weak protest of a Court which does not represent the people, and the only possible security. Should it happen that all branches of the Government united in harmonious action, and that the great majority of the people sustained them, these facts would be evidence that the measure, however novel it might be, was

wise and necessary, and such as ought to be adopted; and that word *ought* commands men and nations and constitutions. In such a case what *ought* a Judiciary to do? Set itself in opposition to the combined power of the people and of the Government? Would not its decree, with whatever strength it possessed, tend to the destruction of the Constitution it professed to support, to the destruction of the nation it pretended to save, to the chaos of revolution and the wild misrule of anarchy?

The powers of Congress must therefore be unlimited, if they are to be "adequate to the exigencies of the Union." They must be unlimited to carry us through the consequences of this war, because these can neither be foreseen nor defined. They must be unlimited over the Union and the Constitution, because the war may make it necessary to alter both. They must be unlimited, because in the perils by which we are surrounded and the greater perils that await us, nothing short of the whole power of the people, exercised without opposition or dispute, can save us from ruin, and it must be exercised wisely too, or it will fail. This power is nothing more than the latent and reserved, but absolute and despotic authority, which every Government must possess, to use in case of need. If it be not granted by the Constitution, it must be employed nevertheless, for we cannot resort to the process of the Fifth Article. If the Union and the Government cannot be saved out of this terrible shock of war constitutionally, *a* Union and *a* Government must be saved unconstitutionally.

We the people of 1862 are not to be commanded to our destruction, by even the best and wisest of the people of 1787, whose bodies are now resting in their graves, and whose spirits are perhaps mourning over the destruction of their hopes. A Union, a Government and a Constitution that suits us we must have. Before us yawns the gulf of separation and revolution, as it did before our fathers in 1787,—monstrous, unfathomable, chaotic,—its darkness lighted only by lurid fires, revealing inexhaustible magazines of passion and the distorted features of the furies and of perpetual war. What shall we do? Amend the Constitution according to the Fifth Article? None

but a madman would propose that now. Shall we, as our fathers did in 1787, call a convention of our wise men to make another Constitution, "adequate to the exigencies of the Union?" We cannot do this in the midst of war. Such labors and deliberations require the calmness and security of peace, and our ancestors waited the return of peace before attempting them. Even then it was a task of infinite difficulty, not so much to make a Constitution as to persuade the people to invest a Convention with authority to make one, and then to persuade them to accept it when made. Yet they had Washington, Hamilton, Jay, Madison and others of similar stamp, to whom they could trust the work. We have no such men, and cannot summon these sages of the past to help us. Neither is it necessary now, as it was then, to abolish an old and to make a new Constitution. The statesmen we have mentioned, if they could not render their performance perfect, did not leave it so imperfect that it must be remodelled or altered in its general plan and structure. They were too wise and too well instructed by experience and by liberal studies for that. The living principles, the true spirit and meaning of the Constitution which they left us, if it be executed by the light of those principles, are sufficient for our preservation, now and forever. If faults it has, these are in its minor and subordinate parts, and its spirit and intention do not more authorize than command us to alter those parts, as time may show them to be defective, or new circumstances may require changes.

Since then we cannot now make these changes according to the Fifth Article, nor call a Convention in the midst of war to decide questions relating to the Union, surely nothing remains to be done but to arm the existing Government by our support, with all the power that a Convention would have, that is to say, with the whole power of the people, because nothing less than the whole can be adequate to the crisis. If the reasoning of this and of the preceding chapter be correct, Congress has now and must have this power, for the reserved powers of the people, if they cannot be exercised, do not exist. But their fancied and asserted existence may nevertheless

afford a pretext for factious opposition to the Government, more dangerous during the war than the arms of the enemy, and more dangerous after the war than treason itself. These imaginary reserved powers of the States and the people gave color and support to the monstrous claims and pretensions which caused the rebellion, and unless they are disavowed and rejected by the good sense of the country, will forever prevent our again becoming a nation, for there can be no such thing in nature as a nation without a National Government.

# CHAPTER III.

## EXECUTIVE POWER.

THE present war has revealed weakness and uncertainty in a part of our system where few expected to find it. The Executive branch of the Government was a novelty, created partly out of the past and partly invented to meet the demands of a new situation. Under the strain of the existing crisis, it has become doubtful whether this invention has the power to provide for the public safety and at the same time maintain the security of personal liberty. As the Convention was obliged to make a Union out of the old Confederacy to suit the necessities of the times, so also were they obliged to make for a Government which was to act directly upon persons and things, an Executive which must not be a king, but must have power and functions very like those of a king. Royalty was out of the question, but some authority to execute the laws, to represent the country in its foreign relations, and to perform other royal duties, was absolutely necessary. How to invent an elective king, a republican king, powerful enough, but not too powerful, was the difficult problem.

All these attributes existed in the English model, therefore in the traditions and recollections of every member of the Convention. In that wonderful product of time, the English Executive, the person to hold the highest social and political rank in the nation, is chosen by law, so that the dangers of a popular election or of the designs of aspiring ambition are avoided. But this person, however important his functions, is scarcely a monarch, for he has no responsibility and but little power. "The king can do no wrong, cannot even intend a wrong." This is the maxim which lies at the foundation of the modern English throne. The meaning of the principle is,

not that the king is incapable of an immoral act, but that, as the law professes to offer a remedy for every wrong, and as the king could hardly be punished without causing a civil war, he is exempted from the penalties of the law. But if the king can do no wrong, his advisers may, and without incurring a like risk, may be made responsible. To impose responsibility without bestowing power, would be unjust, would be impossible. Power and responsibility have thus fallen to the ministers of the Crown; and who are those ministers? Members of the Legislature, holding office only so long as they are sustained by a majority of the Legislature; in other words, by the enlightened public opinion of the nation. The English Executive therefore is monarchical without arbitrary power and republican without being elective. It is unique; a genuine outgrowth of English character. It is a product of the whole past of the nation, its labors, struggles and dangers, aspirations and achievements through the centuries, and its elements may be traced up through the history of the people to feudalism, to Saxon Arthur and Alfred, nay to their German ancestors described by Tacitus, as in the acorn may be found a miniature picture of the future oak.

The irresponsibility of the Crown and the responsibility of its ministers were established as maxims of the British Constitution by the Revolution of 1688. The principle, asserted before, was confirmed and strengthened by that revolution, and the exclusive power of ministers in all important measures soon followed as a necessary consequence. In the early ages of the Government, the functions of the Executive and the Legislature were not accurately divided, as they never are among a rude people. The monarchy was first feudal, and a struggle arose between the Barons and the King, in which the former obtained Magna Charta, the great organic law of English liberty. As commercial wealth increased, the House of Commons acquired importance, and the contest for power was between that body and the King. In the Revolutions of 1645 and 1688, the House of Commons gained the victory, its supreme authority in the Government was established, and Hume says that "the share of power allotted to it is so

great that it absolutely commands all other parts of the Government." Such, therefore, was the condition of the English Executive at the time our Constitution was made. Its essential feature was subordination to the Legislature, for the ministry was and is the real Executive power.

The Convention that made our Constitution were obliged to invent an Executive department, a machine, so to speak, by which the Executive authority, essential to every Government, could be applied. In this as in all other things, the English Constitution was necessarily their model. They could have no other, for the customs and ways of thinking of England were theirs also. Whatever in the English plan of Government was unsuited to their condition, they discarded or altered, but they adhered to it and its principles so far as they could, under the new circumstances in which they were placed. They were about to make an organic law for the Government, superior to it and controlling it, as the act and will of the people. They were about to make a written Constitution, and they could have no other model than the unwritten Constitution of England or the custom of the realm in political law. They adopted it, except in parts which they intentionally altered, just as they necessarily and for the same reason adopted the common law. Psychologically it was impossible for them to do otherwise, for they brought these customs with them to this country in their minds, memories, hearts and traditions. The analogy between our law and that of England is genetic and cannot be overlooked, and the true rule of interpretation is to consider them the same, unless expressly or impliedly altered, because unsuited to our circumstances. It is simply a truth of mental science that such must have been the intention of the law-makers. The Constitution was the embodiment of their thought, and that of the people for whom it was made and who accepted it. Not the civil law but the common law, not French, Austrian or Turkish ideas of government, but English ideas were in their minds, because English blood ran in their veins.

A short time, little more than seventy years,—most of them years of peace and prosperity,—have elapsed, and a crisis has

arisen which is to test the workmanship of the Convention in the Executive power of the Government, as it is testing the Union which they intended to consolidate and make perpetual. Two vital questions have arisen, involving the very ends and purposes of this Government and all Governments: what is the power of the Executive to defend the nation from the dangers of civil or foreign war? and what is the security afforded by law for the personal liberty of the citizens? It seems that both these questions are doubtful, for both are doubted. The President has caused many persons suspected of treasonable designs or practices to be arrested and detained in confinement, suspending the privilege of the writ of Habeas Corpus by his sole authority. Congress has acquiesced and so have the people, for the necessity was urgent and obvious, and the confidence which Mr. Lincoln has inspired is so great and so general, that few are willing to censure acts which all know to be prompted by pure motives and a high sense of duty.

But this general consent is not law, though it may create a precedent which hereafter may become law. The legality of the President's course has been made the subject of much discussion, and different views of it have been taken by men whose opinions are entitled to respect. The Attorney-General, Judge Parsons, Professor of Law at Cambridge, Mr. Binney and others have made elaborate arguments, all different, some of them conflicting. It is therefore plain that the Executive machine constructed by the Convention does not work well, that it puts great interests and essential principles in jeopardy, that it is not clearly understood by those who have to manage it. It is a portion of our Constitution that is new, and therefore has to be tried and construed, and out of that trial and interpretation must grow a rule of conduct for the future. Seeing that things so momentous as national existence and personal liberty are involved, the subject demands a calm and dispassionate consideration, free not only from party bias, but from the exciting influences of even such a war as now disturbs the country.

The question is, which department of the Government has the authority to suspend the privilege of the writ of Habeas Corpus? The Constitution does not say. We must, therefore, be guided to a conclusion by some rule of interpretation. According to the principles above stated, we should inquire first, what is the law of England? secondly, what alteration in it has the Constitution expressly or impliedly made? and thirdly, if there be still room for doubt, what ought now to be established by precedent as the law for this country in the future?

Freedom is the birthright of Englishmen, because the love of it is an essential, inherent characteristic of their race and of theirs only. Out of this attribute of the Saxon nature grew the liberty of the English Constitution. Its free principles existed before the Norman conquest. Magna Charta, the keystone of English liberty, was merely an assertion of ancient but violated rights. During the subsequent struggle under the Norman kings, the confirmation of the Great Charter was the trophy of victory gained by the people over royal power and the price of every concession made by them to it. The laws of the Saxon Edward the Confessor, the civil rights of the people before Norman rule, lived in the heart of the nation, and the Great Charter did not create or bestow them, but declared them. The Petition of Right in 1626, the Bill of Rights in 1688, were nothing more than solemn and formal confirmations of the principles of Magna Charta, violated by a tyrannical and perfidious king, and the declaration of rights, which was the foundation of the Bill enacted by Parliament on the accession of William and Mary, concludes with these words: "And they (the Lords and Commons) do claim, demand and insist upon all and singular the premises, as their undoubted rights and liberties:" and the act of Parliament recognizes "all the rights and liberties confirmed in the said declarations to be the true, *ancient* and indubitable rights of the people of this Kingdom." Thus says Hallam:* "The

* 3 Constitutional History, 140. 1 Blackstone's Comm., 128.

Commons wisely resolved to go to the root of the nation's grievances, and to show their new sovereign that he was raised to the throne for the sake of those liberties, by violating which his predecessor had forfeited it; . . . and thus the declaration of rights was indissolubly connected with the revolution settlement as its motives and condition."

The Act of 31 Charles II, called the Habeas Corpus Act, created no new rights. It afforded a more perfect protection to those already existing, and provided a prompt and effective remedy for their violation. It did not even create the writ of Habeas Corpus, but enlarged its effect. Its true character is described clearly and concisely by the sober and truth-telling historian of the English Constitution: "The essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoliation." "No freeman," says the 29th chapter of Henry III's Charter, which, on the existing law, I quote in preference to that of John, the variations being not very material, "shall be taken or imprisoned, or be disseised of his freehold or his liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him nor send upon him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or delay to any man, justice or right." "It is obvious that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's Charter, it must have been a clear principle of our Constitution that no man can be detained in prison without trial. Whether the courts of justice framed the writ of Habeas Corpus in conformity to the spirit of this clause, or found it already in their register, it became from that era the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II, but *founded upon the broad basis of Magna Charta*, is the principal bulwark of English liberty; and if ever *temporary circumstances or the doubtful plea of political necessity shall lead men to look on its denial with apathy*,

*the most distinguishing feature of our Constitution will be effaced."**

Let us now inquire what was the English law of personal liberty which must have been in the minds and memories of the men who made our Constitution. English history was theirs also. They inherited Magna Charta, the Petition of Right, the Bill of Rights, and the common law, and lived under them as colonists. They were not ignorant of the heroic struggles, through eight centuries of growth and progress, by which these bulwarks of freedom had been built up by their ancestors. It is reasonable to suppose that they would adopt what they could of principles thus sanctified by the wisdom, valor and blood of their own race, and confirmed also by experience and fortunate results. Personal liberty was a right, born of the instinct of the Saxon. It was infringed by the rapacity and tyranny of Norman, that is to say of executive, power. The victory achieved by the people was to subject this power to the restraint of the Legislature, and the writ of Habeas Corpus was contrived as a fit instrument to apply that restraint. The law of England, therefore, is, that every man imprisoned by any authority, shall be entitled to have the cause of his commitment made known to a civil magistrate, and shall be bailed, tried or discharged.

It is obvious that this general law must of necessity be subject to certain exceptions. It is intended to protect civil rights, not to open them to attack, or to disarm the Government in the defence of its own existence against rebellion or treason, or of the nation against foreign enemies. Sedition or war may make it essential to the public safety that the personal liberty of individuals be for a time interfered with, in order that the rights of all may be preserved in the future. The English law intended to prevent the abuse of Executive power, not to trammel the just and necessary exercise of it. The statute of 31 Charles II is an Act of Parliament. It may therefore be repealed or suspended by Parliament, for the English Constitution recognizes no authority superior to Par-

* 2 Hallam's Middle Ages, 41.

liament, which embodies and represents the whole power of the people. The theory is that Parliament is omnipotent, and that theory is underlaid by the great body of ancient inherited rights and liberties, which it is not presumed that the representatives of the nation will ever disregard. They never can, until Englishmen change their nature, forget their traditions, and abandon their customs. No formal enactment or written constitution made by a convention can be stronger than these habits and customs, or more clearly defined, and therefore none could add to the security of the people. It may indeed be said that the Constitution of England is whatever Parliament chooses to make it; but it is safe so long as, by the laws of man's nature, Parliament cannot but choose to preserve it such as it is.

The power of discretionary arrest had been abused by the Crown. The public safety was made the pretext to cover the gratification of the selfish passions of the Monarch. Such is the natural, universal tendency of arbitrary and irresponsible power in the hands of an individual. The genius of the English people never accepted this power as a part of the Royal prerogative. They protested against it from time to time, through many centuries, as a violation of their ancient laws and customs. They made war upon it. At length they restrained it by the Habeas Corpus Act, and established, both practically and theoretically, the law of the land, that no man shall be deprived of his liberty by the Executive power of the Government without the assent and concurrence of the Legislative power; thus placing alike the freedom of the citizen and the safety of the nation where they ought to be placed,—under the protecting care of the *whole* Government. The law and the reason of it are stated with elegance and clearness by Blackstone.

"To bereave a man of his life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny through the whole Kingdom; but confinement of the person by secretly bringing him to gaol, where his suffer-

ings are unknown or forgotten, is a less public, a less shocking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger to the State is so great as to render this measure expedient; for it is Parliament only, or Legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing, as the Senate of Rome was wont to have recourse to a dictator,—a magistrate of absolute authority, when they judged the Republic in any imminent danger. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while in order to preserve it forever."

The public safety alone can, therefore, justify the denial of the benefits of the writ of Habeas Corpus to any English subject, and the Legislature only can suspend the statute of 31 Charles II, which confers the privilege of the writ. That is to say, no man can be imprisoned in England except for legal cause shown or on conviction after trial, unless by the action of all branches of the Government,—of the Legislature which suspends the Habeas Corpus Act, of the Executive which makes the arrest, and of the Judiciary also, which would deny the writ after an act of Parliament suspending it. The public safety is the legal care of all, and the motive and object of all in violating the personal liberty of the citizen.

But it might happen, as it has often happened in England, that the public safety shall be menaced by imminent danger when Parliament is not in session. In such a case, the only branch of Government in a condition to act is the Executive, whose peculiar province, indeed, is action, and to which the care of the nation is primarily intrusted; for the functions of the Judiciary apply to transactions that are past,—it has no spontaneous action, it does not originate or plan. For the time being, therefore, the Executive represents the whole Go-

vernment, whose duty it is to preserve the nation from danger; and any Constitution that did not, in such cases, clothe the Executive with corresponding power, would be very defective. Such a Constitution could not pass through any period of peril of the kind supposed, without being disregarded during the crisis and altered by it, for the law of self-preservation is organic and vital in all Governments. The English Constitution, tested as it has been by the various fortunes of stormy centuries, is not without provision for every danger.

The Habeas Corpus Act can only be suspended by Parliament; but in the absence of Parliament, or even when Parliament is in session, and the case demanded instant and secret action, the Ministers of the Crown, when the public safety has, in their opinion, required it, have habitually taken the responsibility of suspending the benefits or privilege of the writ. When Parliament meet, they immediately ask for a bill of indemnity, and also for a suspension of the act itself, should the danger continue. The consent of Parliament is therefore required for any invasion of personal liberty, either before or after such invasion, has always been asked since the statute of 31 Charles II, and has always been granted.

So entirely is the action of the Executive under the control of the Legislature, that the habit of Ministers to make arrests is not even mentioned by elementary writers on the subject, but the principle is broadly asserted, as in the quotation already given from Blackstone, that such arrests can be made only by authority of Parliament. In an edition of the Commentaries by Christian, Archbold, and Chitty, the practice of the Government is thus briefly and comprehensively stated in a note to the chapter on the Councils of the King: "The Privy Council, in cases of sudden emergency arising in the administration of affairs of state, for which the law has made no provision, assume the responsibility of applying such measures as they deem meet. But they do so under a heavy responsibility; for if Parliament, at its next meeting, should not approve their conduct and grant them an indemnity for acting without the license of law, they become liable upon a charge of misde-

meanor or treason, according to the circumstances of the case."*

The judicial reports may perhaps furnish examples that illustrate the practice of the Government, but it is unnecessary to search for them, when history and the proceedings of Parliament supply abundant precedents of equal authority. Macaulay, speaking generally on the subject, says: "The principle that the King of England was bound to conduct the administration according to law, and that, if he did anything against the law, his advisers and agents were answerable, was established at a very early period, as the severe judgments pronounced and executed on many royal favorites sufficiently prove. It is, however, certain that the rights of individuals were often violated by the Plantagenets, and that the injured parties were often unable to obtain redress. According to law, no Englishman could be arrested or detained in confinement, merely by the mandate of the sovereign. In fact, persons obnoxious to the Government were frequently imprisoned without any other authority than the royal order. . . . But it would be a great error to infer that the English monarchs were, either in theory or in practice, absolute. We live in a highly civilized society, in which intelligence is so rapidly diffused by the press and the post-office that any gross act of oppression committed in any part of the island is, in a few hours, discussed by millions. If an English sovereign were now to immure a subject in defiance of the writ of Habeas Corpus, the whole nation would be instantly electrified by the news. In the middle ages the state of society was widely different. A man might be illegally confined during many months in Carlisle or Norwich, and no whisper of the transaction might reach London. . . . Nor were our ancestors by any means so much alive as we are to the importance of maintaining great general rules. We have been taught by long experience that we cannot without danger, suffer any breach of the Constitution to pass unnoticed. It is therefore held that a Government" (by which is meant a ministry)

* 1 Blackstone's Comm., 232.

"which unnecessarily exceeds its powers, ought to be visited with severe Parliamentary censure, and that a Government which, under the pressure of a great exigency and with pure intentions, has exceeded its powers, ought, without delay, to apply to Parliament for an act of indemnity."*

By virtue of such an act, the measures of the Crown become the measures of the whole Government, that is to say, of the Executive and the Legislature.

The first case that occurred of a suspension of the writ of Habeas Corpus as provided by the statute of Charles II, was in 1689, immediately after the accession of William III. The Government was scarcely established, the exiled king had secured the countenance of France, and had a powerful party both in Scotland and in England. Ireland was in rebellion, and the new establishment threatened by dangers from within and without. A conspiracy to support the pretensions of James to the Crown was discovered, and the leaders were arrested by order of William.

The case was a new one under the law, and he applied to Parliament for advice in the following message:

"That his majesty hath had credible information that there are several persons in and about this town that keep private meetings and cabals to conspire against the Government, and for the assistance of the late King James. That his majesty has caused some of those persons to be apprehended and secured upon suspicion of high treason, and that he thinks he may see cause to do so by others in a little time; but that his majesty is between two great difficulties in this case; for that, if he should set these persons at liberty that are apprehended, he would be wanting to his own safety and the safety of his government and people; on the other hand, if he should detain them, he is unwilling to do anything but what shall be fully warranted by law, which he has so often declared he will preserve; and that, therefore, if those persons should deliver themselves by Habeas Corpus, there would be another difficulty. That his majesty is likewise unwilling

* 1 Macaulay's England, 30.

that excessive bail should be taken in this case; his majesty remembering that to be one article of the grievances presented to him. That ordinary bail would not be sufficient, for men who carry on such designs, in hopes of succeeding, will not stick at forfeiting a small sum; and that this falling out when Parliament is sitting, his majesty therefore thought fit to ask the advice of this House therein, and intends to advise with the Lords also."*

This message excited prompt and earnest attention, and gave rise to a long debate in Parliament, interesting, because it displays the bold, high spirit, the good sense, the love of liberty and love of order and law which animated the counsels of England at this critical period of her history, and which laid broad and deep the foundations of her Constitution. The King made no demand on Parliament. He simply asked advice in a new and difficult emergency. He was met in the same spirit by Parliament, and the discussion that followed shows an anxious desire to arrive at safe and prudent conclusions.

A member proposed to introduce "a short bill, for two or three months, to enable the King to commit such persons as he shall have cause to suspect, without the benefit of Habeas Corpus." This was not granted without much hesitation, for the Habeas Corpus was described as "the general security of all subjects,"—not to be trenched upon except under the stress of urgent necessity. How to reconcile a just regard to the law and to personal liberty with the public safety, was the question then in England, as it is now with us. As one member said, "It is of absolute necessity that those persons be secured for tampering with the Government, and of as absolute necessity that the law be secured too." After much sober and serious deliberation, it was first "Resolved, that the humble thanks of the House be returned to his majesty for his most gracious message in desiring the advice of this House." And then it was "Ordered, that a committee be appointed for drawing up a temporary bill for empowering his majesty to apprehend and

* 5 Cobbett's Parliamentary Debates, 153.

detain all such persons as he shall have just cause to suspect are conspiring against the Government." An amendment was offered, limiting the operation of the bill to a particular time, which was agreed to; and another, "that it be never drawn into precedent or example hereafter," *which was rejected.*

It has remained a precedent and settled the law, and whenever the writ has since been suspended, it has been by a bill in the language and form of the one thus enacted. When the time limited for its operation had elapsed, the danger still existing, application was made for its renewal, by Mr. Hampden, who said: "What is the meaning of all the intelligence that comes out of the country of ill-affections to the Government? And have we not a body here who are mutinying against the Government? . . . Dangerous persons will be delivered out of prison, if this bill prevent it not, and they may act to the subversion of the Government. . . . If the people conspire, the King cannot keep them in prison, since they must come out by Habeas Corpus, if you prevent it not by this bill. *We are in war, and if we make only use of that remedy as if we were in full peace, you may be destroyed without remedy.*" Another member said: "Let the danger be ever so great, I would not dispense with the Habeas Corpus, *but by Parliament. If dispensed with by the Executive power, it is fatal always; by the Legislative power, there is no danger.*"*

It was precisely this supremacy of the Legislative power which was established by the revolution which placed William III on the throne, and by the above precedent was the law of England settled. It has never since been doubted or doubtful. It is needless to cite other examples. They are all of the same character. The Habeas Corpus has been frequently suspended in English history, whenever the Government has been threatened by conspiracy, sedition or treason. It has been suspended by Ministers during the recess of Parliament, or if necessary, whilst it was sitting and without its

* 5 Cobbett's Parliamentary Debates, 267.

knowledge, and also by its previous consent, but in all cases the forms of procedure have been the same as those established by the first case; in all, the consent of Parliament has been asked and given, and in no case has its supremé authority over the subject been doubted or questioned.

What, then, is the whole law of England in reference to the two vital points of personal liberty and the public safety? Is it not that both are placed under the care of the whole Government, each branch acting in its appropriate sphere and manner; that the Executive is subordinate to the Legislature, and cannot act without its consent, expressly given before or after action; that the Executive represents the whole Government in the absence of the Legislature, and may, to protect the public safety, arrest and detain individuals at its discretion, subject to the subsequent approval of Parliament? If such be the law, it may be briefly and comprehensively stated in these words, which are the words of our Constitution: "The privilege of the writ of Habeas Corpus shall not be suspended unless the public safety may require it." Implied power is thus given to suspend the writ, but to whom is it given? To the whole Government. The words can have no other meaning, since no department is expressly or impliedly named. To suspend the Habeas Corpus Act is to suspend the privilege of the writ, but this can only be done by the Legislature, and if such were the language of the law, the power to suspend would be confined to the Legislature. To deny the benefit of the writ in a particular case, is to suspend the privilege of the writ, and this is an Executive act. The language used, therefore, describes the functions of each, because the suspension of the statute by the Legislature can have no other object or effect than the suspension of the privilege of the writ, which effect is also produced by the action of the Executive in making the arrest.

If the definition above given may be regarded as a correct statement of the law of England, it is very clear that those who made our Constitution intended to adopt that law except as they expressly altered it. They simply used the words "privilege of the writ of Habeas Corpus." Those words could

have but one signification to English colonists. They mean the rights of personal liberty inherited by the English people. Evidently, by using those words simply and without qualification, our ancestors meant to adopt the whole English law as settled by centuries of English history and the most interesting events of those centuries, with the exception expressly named in the Constitution. That exception limits the authority of the Government to suspend the privilege of the writ to the two cases of rebellion and invasion, when the public safety may require it. Had they meant any other alteration of the law, they would have said so. Had they meant to confine the power of suspension either to the Legislature or to the Executive, they would have said so. When the subject was under debate, one member proposed that the privilege of the writ should never be suspended at all, under any circumstances. Another, that the benefit of the writ should be suspended only by the Legislature. Finally, after a discussion which seems not to have been very fully reported, the language of the Constitution was agreed upon, and if the words italicised below had been inserted, the intention and meaning of the Convention would have been only more fully expressed. "The privilege of the writ of Habeas Corpus, *as enjoyed by our ancestors and settled by the law and practice of England*, shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

But it may be said and has been said, that the American is a very different thing from the English Executive, and intended to be different in its structure and action. Rank, title and the hereditary element were discarded. The President derives his power from the people; the English Minister is appointed by the Crown. The President holds office during a specified period; the English Minister during the pleasure of Parliament. Thence it is argued that the President is independent of Congress, and possesses co-ordinate authority, responsible for its exercise only to the people by whom he was

elected. It is his duty to take care that the laws are faithfully executed, and to preserve, protect and defend the Constitution. It is primarily and chiefly his duty to secure the public safety in cases of rebellion or invasion. Why may he not act independently of Congress in the performance of these duties, and is not his authority coextensive with theirs? Should it be necessary to suspend the Writ of Habeas Corpus, in cases of rebellion or invasion, why should he wait for or ask at all the sanction of Congress? Nay, is it not plain that he alone has the power? The Constitution implies an immediate grant of power to somebody on the happening of certain events, and provides for no intervening step or form between their occurrence and the exercise of the power. Its language refers to Executive, not to Legislative action. It does not say the Habeas Corpus Act or the Writ itself may be suspended, which would have brought it exclusively within the sphere of Congress, but it says "the privilege of the Writ," an object which the Executive power is sufficient to accomplish.

Such are the arguments by which an attempt is made to show that our ancestors intended to give to their new Executive, powers which their ancestors, in contests which resounded through centuries of English history, succeeded in wresting from their kings; prerogatives claimed by the Plantagenets, Tudors and Stuarts, but always denied by the English people, were revived by the framers of our Constitution, and the reason why this was done, according to one eminent authority, was because the President is so strong; and according to another, because he is so weak.

Washington and his companions, not ignorant of the annals of their race, had probably no such intentions. The language they employed, I have endeavored to show, was consistent with their desire to adopt the law of England in reference to the Writ of Habeas Corpus, except where they expressly altered it, and whatever changes in the Executive department they meant to make, or were obliged to make, every presumption is against their intending to clothe it with greater power than that of the English Executive, more especially with the irresponsible power of secret and discretionary imprisonment.

Power must be given to every Government. If restricted beyond a certain point it ceases to have power. A Government is like an individual. It reflects, it judges, it wills. Like an individual also, it should be a unit, and all its faculties should act harmoniously together. Power is the attribute of the whole, and is divided into power thinking, deliberating and acting. The Legislature thinks and originates, the Judiciary applies to cases as they arise the laws made by the Legislature, the Executive executes them by action, by deeds. As thought is superior to action, the Legislature is the highest power. Therefore in every free Government, the Executive is subordinate to the Legislature. In every Government also, except the rudest, the three departments are separated, and yet not so entirely divided that each does not in some degree participate in the powers of the others, for such division and combination are necessary to produce united action.

In our Constitution, the distribution of power is for the most part the same as in its British model. Where that is departed from, the change is expressly stated, and restrains rather than enlarges Executive authority. The English Executive may declare war, but depends on the Legislature for supplies to carry it on. With us Congress alone can declare war. The English Executive may make treaties; ours can make them only with the concurrence of two-thirds of the Senate. The English Executive appoints all subordinate officers; the President nominates them to the Senate and appoints them by and with its advice and consent. The English Executive has an absolute veto on the acts of the Legislature; the President a conditional one. It is the duty of the English Executive to enforce the execution of the laws, to suppress insurrection, and to repel invasion. These duties appertain to the Executive officer in every Government, chiefly and at the beginning of resistance or danger. To this end he may employ military force, but in England that force is under the control of Parliament. In order that it may remain so, by a usage that has become law, the Mutiny Bill, by which the army is organized, is limited in its operation to one year, and is formally re-enacted at every session. The execution of the laws and

resistance to rebellion or invasion, may also make it necessary to arrest and imprison rebels, traitors and persons suspected of seditious designs. In England, the Executive cannot, as we have shown above, exercise this power without the consent of the Legislature, given before or after the arrest. So that in these essential functions of Executive authority, the enforcement of the laws and the defence of the country from invasion, an English Monarch is by the Constitution of England, controlled by the Legislative power, and must be sustained by it.

We find similar provisions in our Constitution, in relation to the use of military force. Congress, it is declared, shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years. To provide and maintain a navy; to make rules for the government of the land and naval forces; to provide for calling forth, organizing, arming and disciplining the militia; "and the President shall be Commander-in-chief of the army and navy, and of the militia of the several States, when called" (by Congress, as aforesaid,) "into the actual service of the United States." We here find the English law and practice codified in our Constitution. By that law Executive power, even in its primary and essential attributes, is subjected to legislative power. By our Constitution the subordination of Executive authority to the Legislature, is made even more complete than in the English model which was before the minds of the Convention. It is, therefore, reasonable to suppose, that in a matter so vital as personal liberty, and about which the American people were so sensitive, the founders of our Government would not intentionally depart from the English system, which, in other respects they copied so closely, or that if they meant to depart from it, they would have expressly said so. It cannot be implied that they intended to confer upon the Executive Magistrate a power so dangerous, so liable to abuse, as that of arbitrary and secret imprisonment, to be exercised without the knowledge or consent, or even against the will and protest of the Legislature, a power which it had cost the English people five centuries of effort to take from

their kings. To this extent is authority now claimed for the President, not by himself, but by eminent jurists, whose names have just influence on public opinion. But not in the language of the Constitution, in reference to the writ of Habeas Corpus, nor in the provisions that confer and limit Executive power, nor in the analogy between the British Constitution and our own, is such a claim to be found. Neither is it supported by judicial or other authority, subsequent or contemporaneous.

Mr. Jefferson and Judge Marshall, who played a distinguished part in public affairs during the Revolutionary period, were doubtless well informed as to what at that time was considered law, on a subject so important as the right of personal liberty, and it is fair to presume that what they thought, was also the opinion of the members of the Convention.

In 1807, Aaron Burr formed a conspiracy to destroy the Union. It never reached the point of forcible rebellion, but it was feared that it might become formidable in the Southwest, and at one period the danger of open revolt was considered serious. Some of Burr's adherents were discovered and placed under arrest in New Orleans, by Colonel Wilkinson. His conduct was approved by Mr. Jefferson, who was then President, and at his instance a bill was brought into Congress to suspend the writ, Congress being then in session. The bill passed the Senate unanimously, but was rejected by the House, only because news arrived, after the action of the Senate, that all cause for alarm had passed away. Mr. Jefferson in that case followed the English practice, and so did Congress. It is clearly to be inferred from all the surrounding circumstances, and from his conduct, that had Congress not been in session he would, had the occasion required it, still have followed the English practice, and commanded the arrests to be made, for he approved of Colonel Wilkinson's act.

The opinion of Chief Justice Marshall on the subject was given in the case of Ex parte Bolman, 4th Cranch. That

opinion may be considered by lawyers a dictum, because the precise point to which it relates was not in controversy, and therefore it is not, technically speaking, authority. But better or higher evidence of the sentiments of the statesmen contemporaneous with the formation of the Constitution, and therefore of those who made it, than the opinion of Judge Marshall, himself one of the founders of the nation, there cannot be. If any man knew how much English law our fathers intended to adopt, and how much to reject, he knew. He was thoroughly imbued with the best and wisest spirit of the times, and fortunately his long life enabled him, by the light of those times, to settle many difficult and important questions of constitutional law. In reference to the writ of Habeas Corpus he says: "If at any time the public safety should require the suspension of the power vested by this act (the Judiciary Act of 1789) in the courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide. Until the legislative will be expressed, this Court can only see its duty and obey the laws."

We may infer from this, that in the opinion of the Chief Justice the authority to suspend the privilege of the writ, though an Executive act, does not belong exclusively to the President, because the Legislature alone can suspend the power of the courts to issue the writ. We may infer also, that the charge of the public safety is not confided exclusively or chiefly to the Executive.

What the Chief Justice would have said had the question been before him, as it recently was before his successor, Judge Taney, whether, during the recess of the Legislature, in the midst of a rebellion which threatened with extreme and imminent danger the national capital and the existence of the Government, he would not have thought the President justified in "suspending the privilege of the writ" for a time and on his own responsibility, subject to the subsequent approval of Congress, we have no means of knowing. Probably, as he had been an English subject, the uniform English practice on such occasions, as well as the necessity of the case, would

have influenced his judgment, and he would have decided that such legislative sanction was retrospective in its operation, and that by it the act of the Executive became the act of the whole Government.

Something, also, may be inferred as to his opinion from the conduct of his friend General Washington, and of Congress in the War of the Revolution. At that time there was no national Executive,—Congress, which consisted of delegates from the States, acting virtually both as Legislature and Executive. It was a period of war, and the public safety required that persons suspected of treasonable designs and sympathies should be arrested. Many were, for this reason, imprisoned by the Executive power of the States, acting at the suggestion of Congress, and with the approbation of Washington; and this was done either before or after an act of the State Legislatures suspending the writ of Habeas Corpus, thus following the law and custom of England. A case of this sort occurred in this city in 1777. Some twenty gentlemen, of high respectability, were arrested by order of the Supreme Executive Council of this State, at the instance of Congress, banished to a town in Virginia, and there detained. They were not treated as criminals, but with consideration and kindness. Those who chose to declare their allegiance to the Government were released, and all were permitted to return to their homes when it was thought they could no longer be dangerous.

The following extracts from the Journal of Congress, show the opinion of its members on the law at that time. Many of them were also afterwards members of the Constitutional Convention.

JOURNAL OF CONGRESS, AUGUST AND SEPTEMBER, 1777.

"Whereas, the States of Pennsylvania and Delaware are threatened with immediate invasion from a powerful army, who have already landed at the head of Chesapeake Bay. And whereas, principles of policy and of self-preservation require that all persons who may be reasonably suspected of

aiding or abetting the cause of the enemy may be prevented from pursuing measures injurious to the public weal:

"*Resolved*, That the Executive authority of the States of Pennsylvania and Delaware be requested to cause all persons within their respective States, notoriously disaffected, forthwith to be apprehended, disarmed and secured, till such time as the respective States think they can be released without injury to the common cause.

"*Resolved*, That it be recommended to the Supreme Executive Council of the State of Pennsylvania, to cause a diligent search to be made in the houses of all the inhabitants of the City of Philadelphia, who have *not manifested their attachment* to the American cause, for firearms, swords and bayonets; that the owners of the arms be paid for them at an appraised value, and that they be delivered to such of the militia of the State of Pennsylvania who are at present unarmed and have been called into the field.

"*Resolved*, That it be recommended to the Executive powers of the respective States, forthwith to apprehend and secure all persons who have, in *their general conduct and conversation*, evinced a disposition inimical to the cause of America, and that the persons so seized be confined in such places and treated in such manner as shall be consistent with their respective characters and the security of their persons.

"*Resolved*, That persons of like character, and in emergencies equal to the present, when the enemy is at our door, have in other States been arrested and secured upon *suspicions* arising from their *general behavior* and *refusal* to acknowledge their allegiance to the State of which they were the proper subjects, and that such proceedings may be abundantly justified by the conduct of the freest nations and the authority of the most *judicious civilians*."

These arrests were made with the knowledge and approbation of Washington. A writ of Habeas Corpus was issued at the instance of the prisoners, but it was disregarded by the officer in charge of them, and soon afterwards, September 16th, 1777, the Legislature passed a bill indemnifying the

Executive Council and suspending the writ of Habeas Corpus. This bill, as it fully accords with the English law, and is conclusive proof of what was regarded as the law of the Colonies at the time of the Revolution, is worth quoting in full.

"An act to empower the Supreme Executive Council of this Commonwealth to provide for the security thereof in special cases, where no provision is already made by law.

"Whereas, the preservation of this State, and of all its members, and of the army acting in support thereof at the time of a hostile invasion, may require the immediate interposition of the Supreme Executive Council, when the judicial powers of the Government cannot, in the ordinary course of law, sufficiently provide for its security.

"And whereas, for this important purpose the Supreme Executive Council of this Commonwealth have lately, at the recommendation of Congress, taken up several persons who have refused to give to the State the common assurance of their fidelity and peaceable behavior, as required by law, and it is apprehended that there are still more such persons among us who cannot, at this juncture, be safely trusted with their freedom without giving proper security to the public.

"Be it therefore enacted, and it is hereby enacted by the representatives of the freemen of the Commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same, That it may and shall be lawful for the President or Vice-President, and the members of the Supreme Executive Council of this State, or any two of them, either upon the recommendation of Congress or at the requisition of the Commander-in-chief of the army, or the commander of a division or corps in the same, or upon the information of any credible subject of this or any other of the United States, to arrest any person or persons within this Commonwealth who shall be suspected, from any of his or her acts, writings, speeches, conversations, travels, or other behavior, to be disaffected to the community of this or all or any of the United States of America, or to be an harbinger of the common enemy who is at our gates, or to give mediate or immediate intelligence and warning to their commanders by letters, messengers or tokens, or by *discourag-*

*ing people from taking up arms for the defence of the country*, or spreading false news, or doing any other thing to subvert the good order and regulations which are or may be pursued for the safety of the country, and to seize and examine such papers in their possession as shall in any wise affect the public; and, the same persons being arrested, to confine and remove them to any distant place, where it will be out of their power to disturb the peace and safety of the States; or to tender to them the oath or affirmation of allegiance or fidelity to the State, as directed by law, and, upon taking or subscribing the same, to enlarge them, or to demand and take such other and further security and assurance from them as the said President or Vice-President and Council, or any two of them, in their discretion shall think proper, or as the particular circumstances of the case may require.

"And be it further enacted, by the authority aforesaid, That the President, Vice-President, and other members of the Supreme Executive Council of this Commonwealth, and all persons acting by their special command in the premises, shall be and are hereby fully indemnified and saved harmless from all process, suits and actions that shall or may be hereafter sued, commenced, prosecuted or brought against them or any or either of them, for or in respect of any of their orders or proceedings *heretofore* issued and had upon the recommendation of Congress, or which they shall *hereafter* issue and have by virtue of this act. And that no judge or officer of the Supreme Court or any inferior court within this Commonwealth shall issue or allow of any writ of Habeas Corpus, or other remedial writ, to obstruct the proceedings of the said Executive Council against suspected persons in this time of imminent danger to the State.

"Provided always, and it is hereby further enacted by the authority aforesaid, That this act shall be in force to the end of the first sitting of the next General Assembly of this Commonwealth, and no longer.

"Enacted into a law the sixteenth day of September, in the year of our Lord one thousand seven hundred and seventy-seven."

These arrests were not made by the Federal Government, because that Government, before the adoption of the Constitution, could not act upon individuals, but exerted its power by and through the Governments of the States. But Congress, in recommending the measure, declared that "such proceedings may be abundantly justified by the conduct of the freest nations and the authority of the most judicious civilians." It is reasonable to infer that the law and practice which these men and their associates and contemporaries thus commended, they would adopt and establish when they undertook to make a Constitution for a new nation founded by their counsels and valor, and that any deviation from the old and cherished custom would be expressly provided for, and not left in doubt.

Mr. Hamilton was another leading spirit of the Revolution who left the impress of his fine intellect upon the history of the period. He was united with Washington and Marshall by the sympathy of great souls engaged in a noble cause, and was, with them, a chief co-founder of the nation. He was a member of the Continental Congress during the war, and also of the Convention that framed the Constitution. In the latter he played a very conspicuous part. No opinion of his on the Habeas Corpus clause in the Constitution is perhaps on record, but we may infer what he would have thought of the authority of the President to suspend the privilege of the writ, during the recess of Congress, from the reason that he gives for vesting in the President the pardoning power, even for the crime of treason. "The principal argument," he says, "for reposing the power of pardon, in this case, in the Chief Magistrate, is this: in seasons of insurrections or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the Commonwealth, and which, if suffered to pass unimproved, it may never be afterwards possible to recall. The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal."

This reason applies far more strongly to the power of the

Executive, in the absence of the Legislature, to arrest conspirators and traitors. It is a measure much more forcible and effectual than the offer of a pardon. Prompt action may often break up a plot and defeat its object, when on the eve of execution. The delay of a day or an hour might decide the fate of a government, by giving time to able leaders to concentrate forces and make an attack, which might convert a rebellion into a revolution. English history is full of such cases, and so is all history. With such precedents in his memory, with the law and custom of England and of the Colonies, and the practice of Congress during the war of the Revolution before his mind, it is impossible to believe that Mr. Hamilton could have written the above argument and not have been willing to apply it to a case so analogous as the power of the President to suspend the writ of Habeas Corpus during the recess of Congress. As that power, however, may be abused and lead to severity, and the pardoning power only to mercy, as the first infringes and the other respects human liberty, the former is wisely placed ultimately under the restraint of the Legislature, whilst the latter is left wholly to Executive discretion.

These instances are not cited as legal authority in a technical sense, but as evidence of what must have been the opinions of Washington, Marshall, Hamilton and other eminent men, members of the Continental Congress and founders of the Government. It is inconceivable that they intended to invest the President with a prerogative, which their ancestors in many bloody and heroic struggles wrested from feudal kings. It is also inconceivable that the Convention intended to disarm the President at the very moment when he alone could act for the defence of the public safety, thus inviting attack by providing a period of weakness. But it is conceivable, considering the excited feelings of the people and of the time in favor of liberty, that whilst the Convention adopted the English law as their model, they should alter it, as they expressly did, by limiting at once the power of the President and of Congress. Guided by these examples, by history, and by the language of the Constitution, could not the law, English and American, be

thus stated: "The privilege of the writ of Habeas Corpus may be suspended by the Executive power, by and with the consent of the Legislature, given before or after such suspension, in England when the public safety may require it; in America, when in cases of rebellion or invasion, the public safety may require it."

The action of the Executive does not suspend the privilege of the writ, except in the particular case of the individual arrested. The benefit of the writ is a personal privilege, the right of every citizen. That remains until the writ itself be suspended by authority of the Legislature. It remains even to the person arrested, who may still claim that the writ be issued, and the cause of his commitment made known to a civil magistrate. *Prima facie* his arrest is a wrong for which in England the Ministers are personally responsible, and for which he has a claim for damages. Therefore it is that Parliament passes a bill indemnifying them for what, until thus sanctioned by Parliament, is an illegal invasion of the liberty of the subject, and the law presumes that Parliament will sanction the acts of Ministers, when honestly intended for the public good, and will also refuse to relieve them from the consequences of unjust, unnecessary or oppressive severity. The English practice grew out of overruling necessity, and whilst it respects the principle that an act of Parliament is inviolable, except by Parliament, and maintains the principle of the responsibility of the Ministers of the Crown, it provides also the defence of the Government and the nation.

It may be said that our Congress with its enumerated and restricted powers is very different from the English Parliament, which is theoretically omnipotent, and therefore that the former cannot divest a right of action which had accrued to an individual by reason of a violation of his liberty, *prima facie* illegal. But surely the Convention had authority in making the Constitution to bestow power on Congress in this or any other particular, and the question is, what power did they grant? The purpose of the present argument is to show that they adopted the whole English law in reference to the writ of Habeas Corpus, with the exception expressed in the Constitu-

tion, and if so, the English practice with regard to bills of indemnity, in which practice is involved the great vital principle of English liberty, the subordination of Executive to legislative authority.

It is interesting to observe how the wisdom of the English law has been vindicated by the rebellion and civil war now raging in our country. That law grew out of the stress and strain of such trials, and is therefore fit to cope with them, and we see it now adopted, perhaps unconsciously and unintentionally, by the Government, notwithstanding opposing opinions, simply because it suits the emergency. All the danger from violence, privy conspiracy and treason, that ever threatened the English nation in the worst times have assailed ours in these. The life of Mr. Lincoln was menaced by a plot to assassinate him as he was going to Washington to assume the office to which he had been elected by the people. He escaped only by travelling secretly to the National Capital. He there found himself in the midst of enemies. Civil war had commenced. The Government had been carefully disarmed, and its enemies strengthened by his predecessor. The army, the navy, every civil department, nay, even the Executive mansion itself, were filled with spies and traitors, eager and active to assist the rebellion, many of them every day openly enlisting in its cause.

On one side of the Federal City was Virginia, disaffected, excited, and ripe for revolt. On the other, lying between Washington and the loyal North, was Maryland, waiting only the advance of the rebels, to rise in arms for their support; not waiting indeed, but assaulting the troops of the Government as they were marching to its defence, and destroying bridges and railroads to cut off its communication with its supplies and its friends. The Capitol was thus surrounded by hostile territory, was beleagured and threatened. Congress had adjourned, with a lingering hope that peace might yet be preserved, and had therefore failed to make preparation for war. The Presi-

dent stood alone, the representative of the Government and of the nation. If he could not act, no one could. The necessity was urgent for some power to resist and repel the rebels, for had their plans succeeded, the seat of Government would have fallen into their hands, and the President himself would have been driven from it or put to death.

When every moment was thus fraught with danger, was he to hold his hand and wait until the question could be debated and settled by lawyers, whether the Executive or Legislative power, under the Constitution, could suspend the Writ of Habeas Corpus? Or was he, when he had seized and secured a conspirator, to permit the officer who had him in custody to leave his command, and obey a writ issued by a disaffected judge, or any judge, that legal questions might be discussed in the midst of a seditious population, or anywhere else, when the crisis demanded prompt and vigorous action, and the delay of an hour might be fatal? A constitution that imposed such a fetter upon authority, would violate the supreme, organic law of every State, and a crisis like the one described would rend it to tatters. All constitutions and all laws are meant to protect the public safety, not to endanger it, and if they fail, they cease to be laws, and must be disregarded when an emergency arises.

Mr. Lincoln was equal to the occasion. He did—and the resemblance is worth noting—precisely what William III did under similar, but far less difficult and perilous circumstances, when the fate of the nation hung on the decision of the passing moment. The case was a new one, the law was doubtful. So it was in the first years of King William's reign, yet he did not hesitate. As soon as Parliament assembled, he told them what he had done, explained his reasons and motives, and asked them to ratify his acts. Mr. Lincoln did the same thing. In his Message to Congress, which in its spirit and purpose is similar to that of King William's, he says: "The whole of the laws which were required to be faithfully executed, were resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of

the means necessary to their execution, some single law made in such extreme regard to the citizen's liberty, that practically it relieves more of the guilty than of the innocent, should, to a very limited extent, be violated? . . . Are all the laws but one to go unexecuted, and the Government itself to go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken should the Government be overthrown, when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that the privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it, is equivalent to a provision that such privilege may be suspended, when in such cases the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ, which was authorized to be made. Now it is insisted that Congress and not the Executive is vested with this power. But the Constitution is silent as to which or who is to exercise the power, and as the provision is plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended that in every case the danger should run its course, until Congress could be called together, the very assembling of which might be prevented, as was intended in this case by the rebellion."

The native sagacity of the man, stimulated by the occasion, has here discovered and pointed out the reason of the English law, and he concludes by saying in the spirit of that law, that "whether there shall be any legislation on the subject, and if any, what, is submitted entirely to the better judgment of Congress." He did not ask in terms for a bill of indemnity, because perhaps he was not thinking of himself or of the personal consequences of performing his duty. But he asks the sanction of Congress for what he had done, as in a previous paragraph, in relation to the responsibility he took in calling out the militia and increasing the regular army to resist the rebellion, he says: "These measures, whether strictly legal

or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the *constitutional competency of Congress.*"

These few simple sentences contain the whole law of England on the relation between the Executive and Legislative departments of the Government, and that it has thus been unconsciously expressed by Mr. Lincoln, in a state paper, written under the pressure of a great danger and a great responsibility, is a signal proof at once of the wisdom of the law and of the deep root which English traditions yet hold in the American mind. Mr. Lincoln is not a learned man; he is something far better, he is a wise man. It is not probable that he had the English practice before his mind when he wrote that message, or he would in express terms have asked for a bill of indemnity. But he is not ignorant of the general principles of the common law, of the leading events of English history, and his reason drew from those principles and events their legitimate conclusion. He has in brief words declared that the Executive is subordinate to the Legislative power; that the Executive is, as such, charged with its share of the duty of providing for the public safety, and in the absence of the Legislature, with the whole of that duty, because representing for the time, necessarily, the whole Government; that if, in the *bona fide* performance of such duty, the President transcends the limits of executive, and exercises legislative authority, Congress ought to ratify his acts; and lastly, that when they are thus ratified, they become in law legislative acts, provided "that nothing has been done beyond the constitutional competency of Congress." His language implies even more than this. He says in effect to the Legislature, "I have exercised powers that regularly belong to you. What I did was done only because you were not here, and the necessity for prompt action was urgent. I 'submit' my acts to your judgment. If you approve them, make them yours." What is this but to admit the right and the duty of Congress to guard its own powers and to resist the usurpations of a Presi-

dent, by disavowal, by denunciation, by impeachment, unless his conduct was justified by the occasion, and there was no reason to suspect him of criminal intentions?

It is to be remarked, moreover, that Mr. Lincoln exhibited forbearance and moderation in the exercise of his authority, going no further than was demanded by the necessity of the case. He authorized, as he says, only a qualified suspension of the privilege of the writ. The writ itself was never suspended at all. The benefits of the writ are the privilege of every citizen. These were not denied to the people or to sections or classes of them. One of these benefits, and perhaps the most important, has not been denied even to individuals arrested by order of the Government. They still have been entitled to the writ, to which a return has always been made by the officers in whose custody they were, stating the authority by which they were committed and the charges against them. Publicity has thus been secured, a most important protection to personal liberty. There have been no secret arrests, no *lettres de cachet.* The prisoner and his friends have known, or have had the means of knowing, the offence of which he was accused, and the place of his confinement. They have thus had the means of obtaining his release, either by disproving the charges made against him or by giving satisfactory assurances of future good behavior; and the Government has shown as much liberality in discharging prisoners, as caution in committing them. Whilst the courts can issue the writ and the Government continues to obey it, so far as to return the cause of the arrest and by whose authority it was made, the privilege of the writ is not fully, but partially suspended, and the power of discretionary imprisonment by being stripped of secrecy, is disarmed of its most dangerous attribute.

It therefore appears that, whether as expounded by Mr. Binney, the President has the sole and exclusive power to suspend the privilege of the writ in cases of rebellion or invasion; or whether he may do so without the sanction of Congress, because of his independent and co-ordinate authority, as declared by the Attorney-General; or whether the existence of civil war puts the country under martial law, and

therefore, as some contend, clothes the President with military power over the civil courts and civil rights; or whether, as above argued, the English law of Habeas Corpus is also ours, and as Mr. Lincoln seems to think, for his action and his language accord with that opinion, he at least has done his duty. He has been guilty of no usurpation or stretch of power. He has shown neither fear, favor nor affection, personal feeling or partisan passion, but on the contrary, has administered his great office so impersonally, as the representative of Executive power, and with so much fairness, candor and modesty, that even the reckless rancor of party spirit has not ventured to impugn his motives.

Whilst, however, the course of the President has been clear of doubt and beyond reproach, the conduct of Congress cannot be easily explained or justified. Why did they not at once respond to Mr. Lincoln's appeal? The law was unsettled. He himself said so; and the variety of opinions on the subject proved it to be so. Why did, why does Congress permit the golden moments to pass, when, if ever, the meaning of the Constitution on this most vital point might be established for all the future? Mr. Lincoln took on himself a heavy responsibility in their absence. He told them so, and asked for their support. They did support him in the matter of military force to quell the rebellion; they gave him more men and more money than he asked. Why have they been silent in relation to the power of discretionary imprisonment of suspected and dangerous persons which he employed for the same purpose, and which involved constitutional principles more important even than the calling out of troops without the previous sanction of the Legislature? Was he guilty of usurping authority? Congress is bound to say so. Was he thus guilty to serve the purpose of criminal ambition? It is the duty of Congress to denounce or impeach him. Did he honestly mistake the law and thus set up a dangerous precedent? The silence of Congress will establish that precedent. Was he in truth right in law as in deed, and justified by the Constitution in his fearless and honorable discharge of high and difficult duties? Then, both he and the law are entitled to the support of Con-

gress, more especially as he asked for it, and it is unjust to cast upon him the responsibility of measures, which, as they were in their nature partly legislative, the Legislature ought to share.

The Republican party, who desire to crush the rebellion and to restore over the whole country the authority of the Union and the laws, are supposed to favor the opinion that the President has exclusive power to suspend the writ, either under the Constitution or by reason of the abnormal rule of martial law. Why then not say so and thus support their chief who asks support? They cannot say the law is settled, for this construction of it is rejected impliedly by the President himself and expressly by the Chief Justice of the United States. Neither can they deny that it is of great importance both to the country and to the President that his powers be clearly defined. The Democratic or opposition party is supposed to sympathize to a greater or less extent with the South and the rebellion, to advocate the doctrine of State Rights, and to oppose the motives and objects of the war. Their opinion is understood to be, that the privilege of the writ of Habeas Corpus can be suspended only by the Legislature, although the very life of the Government may be menaced during the recess of Congress and however imminent the danger may be. Why then does that party permit a principle, in their judgment so dangerous to liberty, to be silently by precedent introduced into the Constitution? It is true they are a minority, but surely for the sake of the future they might speak out and bring in a bill declaratory of the law as they understand it, and thus place on the record their opinion on a question that so deeply involves the interest of the future.

So far, however, the only thing to be inferred from the conduct of Congress is, that Mr. Lincoln has been justified. Silence implies more than consent, it implies approval in cases where, unless there be approval, remonstrance or censure would be a duty. And no doubt the silent acquiescence of Congress and of the people in measures affecting a thing so vital as personal liberty, so cherished, so dear to the popular

heart, is to be ascribed to the general conviction that they were necessary, and to the impression made by the character of Mr. Lincoln. The majority of Congress and the masses of the people are enthusiastic in their desire that the war may lead to speedy victory and its objects be accomplished. They see that the power to arrest the seditious, open or covert, not as a punishment for crime but as a precaution against danger, is a means as necessary to success as an army. They are convinced that Mr. Lincoln may be safely trusted with that power. Therefore, they behold with calm and grave satisfaction, men suddenly seized almost every day, sometimes at their firesides, and hurried off, without inquest, indictment or trial, to a distant prison,—a spectacle which, but for the reasons mentioned, would have roused the country into angry billows of passion, as the wind rouses the rage of the Atlantic.

The people know the necessities of the hour, and appreciate the man whose hand is on the helm. They trust him. By a few plain and simple sentences and unostentatious deeds,—by golden silence and by silvern speech,—by masterly action and by masterly inaction, this sage and hero from the backwoods has, in one short year, commanded the entire confidence of a great nation, of a people the most intellectual and forcible on earth. Before the grandeur of that sentiment the base spirit of party cowers in silence, and the venomed tongues of the demagogues are obliged to hiss in whispers. In all debates and discussions, legislative or social, it has become the custom to mention the name of Mr. Lincoln with respect. Clothed in the raiment of truth and justice, he walks unscathed through the fiery furnace of civil war, and enters without fear the murky dens of party, where the howlings and gnashings of envy, hatred and revenge are awed into silence by his presence. It is a signal instance of the magnetic power of character, which conquers, like beauty, merely by being seen. By no popular arts, by no dazzling glare of military or other renown, by no previous services to the country, by no shining or captivating graces or accomplishments, but by the quiet and unostentatious display of a national and catholic spirit, of a good heart, of perfect integrity and purity of motive, of

valor to meet danger and of ability to cope with difficulty, has this man of plain manners, who in his youth worked as a farm laborer, seated himself without an effort on a throne nobler than that of King or Kaiser,—the respect and faith of his countrymen. He took the place with natural ease because it belonged to him, as an eagle calmly perches on the topmost bough of an oak or the loftiest crag of a mountain. Indeed, if we look into the matter accurately, he has always occupied a similar place, and by precisely the same title, for his neighbors called him "Honest Abraham Lincoln," and the only difference is, that now he is known to a nation, before to a village. It is a feat that has not often been performed in the world, and in our history only once before, and then by Washington. It would be a good thing if, from the example of both, all potentates and aspirants to power, whether Princes or Presidents, could learn that,—

"Corruption wins not more than honesty."

But the eagerness of Congress and of the people for the prosecution of the war, or their confidence in the talents and virtues of the President, will not settle the law of Habeas Corpus.

Our Constitution has been working now for seventy-two years, and its construction is yet doubtful on two points of prime importance,—the defence of the public safety and the security of personal freedom. No man can tell what the law is or will be, from anything that has been said or done by Congress or the President, though some guess may be made, from the decision of Chief Justice Taney in Merriman's case, as to what the courts will say, should the question come before them. As it is an open question, we may treat it in the spirit, not of lawyers, but of lawgivers, and consider, not what the Constitution is, but what it ought to be. This, indeed, is the higher and nobler topic of the two, and is presented from time to time both by the advancement of a nation and by its decline. Laws and customs become obsolete, because unsuited to new condi-

tions of society, introduced either by its decay or by growing knowledge and the needs of improving civilization.

> "All the years invent;—
> Each month is various to present
> The world with some development."

The conservatism that would bind the present in the fetters of the past, is as unwise, as the rash spirit of innovation that perils attained good on the wild sea of experiment. To yield slowly, to cling to the old things that have been tried, because they have been tried,—even because they are venerable, although their use may have apparently passed away,—to distrust new things, and so to adopt them that they may harmonize with the old, has been the practice of the English people. It has enabled them to pass through great dangers without disastrous revolutions, and gradually, without shocks of change, to convert a feudal and almost absolute monarchy into a monarchical and aristocratic Republic, and to combine liberty with order and stability. No part of the English Constitution exhibits in a more signal manner the masterly workmanship of time than the English Executive power. It has proved fully equal to the task of protecting the nation from danger, without encroaching upon the right of personal liberty. It has done this whilst acting in subordination to Legislative power. The question now presented to us is, shall we so construe the Constitution as to give to the Executive (in cases of rebellion or invasion) exclusive control over the liberty of the citizen, to enable it to defend the public safety?

We should do this, some contend, because the President is so weak that he needs support against the Legislature, which threatens to absorb all the power of the Government. But on the point in question, he would have all the power of the English Ministry, should the English law be adopted, and experience has shown that to be sufficient for the purpose. It may be said, moreover, that he has more than all the power of Ministers. They are members of the Legislature, which he is

not. They therefore have a direct personal interest in maintaining the rights and authority of the Legislature, whereas no such influences act upon the President, but as might easily happen, one directly opposite. The Ministry go out of office when their important measures are opposed by a majority of Parliament. The action of Government, therefore, responds easily and promptly to the wishes of the people. The President retains power during his term, however repugnant his policy may be to Congress or to the nation. If, therefore, the English law, which refuses to the Crown the power of secret and discretionary imprisonment, for any cause, without the consent of Parliament, be wise, there is a stronger reason why the President should be subjected to the same restraint, unless indeed there be something in the Constitution of Congress which renders that body unfit to exercise or share the power. But Congress represents the people, and all parties of the people, the minority as well as the majority, whilst the Senate more especially represents the States, and was intended to be the conservative influence in our system to restrain the impulse of popular passion. Experience has shown that the President is likely to be the mere chief of a party and of the Democratic party. The natural tendency of a democracy is towards despotism, and the occasion on which it becomes despotism very generally grows out of civil strife and anarchy engendered by itself.

In such times bold, ambitious men, of commanding talents, seize the opportunity offered by disorder and misrule to execute their designs. Irresponsible power to make secret arrests would be a formidable weapon, fashioned for their purpose. It is true, the terms of the Constitution confine its exercise to the cases of rebellion and invasion. But what is rebellion or invasion? It is easy to call almost anything by these names, in order to give color to wicked designs, and cover them with the semblance of legality. When, some years ago, Mr. Polk and his party wished to plunder Mexico of territory, they discovered that Mexico had invaded our country. "American blood has been shed on American soil," they said. "War therefore exists." And they made war on that weak nation,

and got what they wanted in territory, but not what they wanted in General Taylor for next President. Mr. Polk denounced those who opposed the war as "moral traitors," and it would have been a short and easy step in his logic, had his purposes required it, to declare, that in this case of invasion, the public safety demanded the arrest of such traitors.

Not long ago, the people of Kansas, having been attacked by armed bands from Missouri, insulted by iniquitous laws imposed on them by fraud and violence, and exasperated at seeing the Federal Government in league with the men by whom these outrages were committed, assembled together in public meetings to protest against such oppression. They went so far as to call a convention to make a Territorial Constitution for themselves, instead of the one which had been made for them by the Missourians. Mr. Buchanan declared that they were rebels. He marched troops against them. It would have been a plausible pretext to declare that the public safety required the suspension of the privilege of the writ of Habeas Corpus, because of the rebellion in Kansas. Had the President possessed the exclusive power to do this, prominent men in and out of Congress, who sympathized with the Kansas people, might have been imprisoned and silenced. But Mr. Buchanan was not fitted by nature to play the part of a usurper, or to lead a fierce democracy or a Southern chivalry to empire over the ruins of a government. Had he been so, he would have found backers, even at that time, North and South. The Lecompton Constitution, and the efforts to force it upon the Kansas people, are sufficient proof of a reckless partisan spirit, and of sectional ambition that wanted only a leader to culminate, as they have since done, in civil war and attempted revolution.

Mr. Buchanan, with all the aid of his Southern and Northern friends, and all the influence of Executive patronage, failed to obtain a majority for that iniquitous measure, corrupt as Congress was. He would have failed also had he asked them to suspend the writ of Habeas Corpus. But suppose that he alone had possessed the power to suspend it, and had been gifted with the commanding talents of a Cromwell, or

even with the strong will and violent passions of a Jackson. Would not such a power have been a terrible engine in his hands, supported as he probably would have been by the cheers of a Northern democracy, and encircled as he certainly would have been by the swords of a Southern army? Other similar cases might be cited from our own history, and many from the annals of other nations. What has happened before may happen again. The President is independent of Congress in the mode of his appointment, and in the duration of his power. The majority of Congress may be opposed to his measures and plans, may know them to be dangerous and dishonest, yet he may be sustained by a desperate faction or section. He may be a man of ability, courage and reckless ambition. Democracy breeds and nurtures such. To invest one of this character with arbitrary authority over personal liberty, therefore over the freedom of speech and of the press, to be exercised secretly and without responsibility, would be to place at his feet, so far as the law could, the liberty of the people and the existence of the Government. To appoint beforehand cases of "rebellion and invasion" as the occasions when he might use this power, would merely be to select the opportunities which he himself would choose, periods of disorder, when armies were in the field, and men's minds excited by passion and alarm, and when, with least risk, he could accomplish his purpose.

Not only does the President retain office for his term, though opposed by a majority of Congress, but also against the wishes of a majority of the people. He may become the representative of an aggressive, violent and desperate faction, determined to rule or ruin. The President may be legally elected by a minority of the people, as was the case both with Mr. Buchanan and Mr. Lincoln. He may commence his term with a majority of Congress, and before the end of it alienate his friends, as did Mr. Buchanan. The misconduct of the President, that would require the restraint of the Legislature, ought and, in a healthy state of public opinion, would deprive him of the support of his party. Mr. Buchanan found himself without a majority in Congress before the close of his term; but he had a party outside of Congress arming to overturn the

Government. He helped them by inaction, by connivance. His own officers helped them by surreptitiously furnishing them with weapons and ammunition, the property of the Government.

This party claimed a constitutional right to extend slavery in defiance of the will of the Legislature. They claimed also a constitutional right to secede. They found many advocates of both claims in and out of Congress, in the North as well as the South. If all these were correct in their opinions, who were the rebels? The South resisting illegal oppression or the North resisting Mr. Buchanan? Had he been made of sterner stuff, and been of a nature to carry with him the passions of the populace, he might have afforded his friends more effectual aid than he did. In that case the authority, at his discretion, to arrest and imprison any one who ventured to oppose him, would have been a potent instrument in his hands; and armed with it, and other Executive powers, he could, even in the few months he remained in office after the rebellion began, have given to the war a very different character from what it now wears, if indeed he would not have prevented it altogether, by establishing the supremacy of slavery and the South.

The Executive officer of our law, it thus appears, may be elected by a minority of the people, or by a section of the country, or by both, and he may be opposed by a majority of Congress, yet retain his power for four years, a period not too short for the execution of ambitious designs.

An English ministry is not elected at all, but is appointed by a branch of the Government elevated, so far as it can be by human means, above the influences of partisan prejudice or popular passions, and bound, more than any, by personal interest to uphold the permanent glory and greatness of the nation. The ministry are appointed by the monarch, whose rank and power are not affected by the rise and fall of parties, and who can only be injured by a revolution. The officer chosen by the Crown to administer the Government cannot be a candidate of a party united for the purpose of placing him in power, although he may be a representative of the

principles of a party, and he cannot hold power in opposition to the will of Parliament, of which he is also a member. It is, therefore, scarcely possible that he can become the leader of a faction whose purpose would be to destroy the rights of Parliament, or to overthrow the Constitution. Our experience is far otherwise, and therefore, with greater reason than in the English system, should the President be subjected to legislative control in a matter so sacred as the security of personal liberty.

The importance of the principle is as well illustrated by supposing the President sustained by a majority in Congress. He would, therefore, be the more dangerous, if his intentions were evil, whether he possessed exclusive or co-ordinate and independent authority to suspend the privilege of the Habeas Corpus. Before this could be done, if to do it required the sanction of Congress, the necessity for such a measure would become a subject for debate, in which the minority could at least make an appeal to the country, and perhaps obtain a hearing, even amid the turbulence of democratic passions. Such an appeal, aided by a free press, might bring out the patriotism and good sense and good principles of the country, and thus influence the action of Congress, as happened when the Lecompton Constitution was under discussion, or it might affect the election of a succeeding Congress before the expiration of the President's term, as happened during the administration of Mr. Buchanan, who began with a large majority and ended with a small minority. But if the President had exclusive power to suspend the privilege of the writ, he could silence remonstrance, denunciation or debate, either in the Legislature or the press, and if supported by an unscrupulous majority in Congress, it would be difficult to set any limits to his ability to do mischief. It would be easy to call any meeting of the people assembled to express disapproval of his policy a rebellion, and as easy to find that such rebellion

endangered the public safety, and thus the engine of revolution or oppression might be set in motion.

The case might occur of a patriotic and virtuous President, resisting, in a period of popular excitement, a factious and corrupt majority of Congress in sympathy with a rebellion or invasion, and who therefore might refuse to authorize the suspension of the privilege of the writ. As a rebellion is usually connected with the interests, doctrines or passions of a party, it has, in most cases, secret or avowed friends and adherents in every rank of society, and even in official station. Such is notoriously the case at the present moment. A numerous party in the North sympathize with the rebels, advocate their principles, magnify their power, extol their victories, lament their defeats, give them secret aid and open support, and oppose and vilify every measure of the Government to restore the Union and enforce the laws. That party has its representatives in Congress, in the army, on the Bench, even, it is said, in the Executive departments of Government. It often happens also in a foreign war, that the enemy has allies in an invaded country, for a foreign war may be also connected with party politics. All history is full of such examples, including our own. There have been periods in this country when a war with either democratic France or conservative England would have secured for either a large body of passive well-wishers, if not of active adherents.

But if, because of these risks, the President ought to be clothed with exclusive or independent control of the writ of Habeas Corpus, so ought he to have the same power to call out the militia and to provide for enlarging and supplying the army, means even more efficient for repelling invasion or quelling rebellion, than authority to arrest suspected or seditious persons. In all Governments we must place power and repose confidence somewhere, and in this naughty world of ours we can find no other depository for them than poor, weak, erring humanity. Power will always be abused, we may be sure of that. The only question is, where can it be placed with the greatest chance of safety. It is true that the great danger of a democracy is the tyranny of a majority.

But the power of a majority led by a single chief is far more dangerous than that of a majority represented in a legislative assembly, because the former is more prompt, more vigorous, more secret and more persistent. The action of the Legislature is subjected to the delays of form, of debate, of the resistance of the minority. It is renovated by elections recurring during the Presidential term, which may exert upon it the influence of the sober second thought of the people. In our Congress both branches must agree to any measure. The leader of a party, moreover, is apt to possess more of the qualities which dazzle and captivate the multitude. A military hero is especially the object of their passionate admiration. Military heroes are developed by war, by "rebellion and invasion," and these occasions afford to criminal ambition opportunity to execute its plans.

For these reasons in part, the natural tendency of a democracy is towards a military despotism. An American President has been, and is likely again to be, a partisan democratic chief. He has been, and probably again will be, a "military hero," blindly and passionately supported by the masses. He holds office for four years, with or without a majority of Congress, with or against the wishes of a majority of the people, and in either case it might be dangerous or fatal to public liberty to invest him with exclusive power over private liberty. Wiser and safer is the English plan, which places both, together with the public safety, under the charge of the *whole* Government, requiring the action of the Executive branch to suspend the privilege of the Habeas Corpus, and the thought of the Legislature to determine the necessity for a measure which nothing but necessity can justify.

It may be supposed that the power of impeachment vested in Congress is a sufficient restraint on Executive abuse. Where the President is the offender, however, and in cases of real danger, it would not prove effectual. The same reason that has rendered an English monarch irresponsible, and given rise to the maxim that the King can do no wrong, applies to our Chief Magistrate. A President could hardly be punished without causing a civil war. To be elected he must

have a party. Unless he were a man of talents and forcible character, and supported by a strong party, he would not attempt to carry extreme measures by violent means, or to overthrow the Government, either of which implies a state of high popular excitement. A strong party inflamed by passion, would not permit a leader of powerful ability to be punished, and the attempt to punish would precipitate a revolution. The penalty, in case of conviction on impeachment, extends only to loss of office, and a man who has made up his mind to the daring attempt of destroying the Union or overturning the Government, has already taken a worse fate than that into his account. Impeachment, therefore, is possible only against a weak President, with a weak party, in quiet times. It would prove a feeble defence amid the storms of popular passion, when bold men are tempted by opportunity to plunge into crime. The very possession by a party leader of such a weapon as the power of secret imprisonment might determine his action.

> "How oft the sight of means to do ill deeds
> Makes ill deeds done."

In the beginning of the reign of Charles I (1628), which, ere it closed was destined to develop and establish the principles of English liberty, the young king, among other things, boldly claimed the power of committing to prison, without specifying any offence in the warrant of commitment, and the Judges, under his influence, decided that they had no power to examine such commitments and admit the prisoner to bail. This and other similar assumptions were resisted by Parliament, which then gave tokens of the free spirit which afterwards hurled this king from his throne, and that resistance was indeed, as Lord Campbell says, "the grand crisis of the English Constitution."* It was the commencement of the struggle for ancient rights that ended in their triumphant establishment on a firm basis in 1688. Sir Edward Coke was a member of the first Parliament of Charles I, and sounded the

* 1 Campbell's Lives of the Chief Justices, 270.

charge in resistance to his arrogant demands. He opposed the King's claim of the right to imprison, and denied the legality of the decision of the Judges in these words: "What is it but to declare upon record that any subject committed by such absolute command, may be detained in prison forever? What doth this tend to but the utter subversion of the choice, liberty and right belonging to every freeborn subject in this Kingdom? A *Parliament* brings Judges, officers, and all men into good order." He succeeded in carrying resolutions which half a century later were made the foundation of the Habeas Corpus Act. So thought this great lawyer fifty years before the English people obtained the writ, which has since been called the bulwark of their liberties; so, as we have endeavored to show, thought the makers of our Constitution a hundred years after that writ had been in successful operation; so ought Congress now to think, when the ordeal through which the Government is passing indicates the wisdom of the English law and of the whole law. At any rate, the law should now be permanently settled by an authoritative precedent, for open constitutional questions are mischievous evils. The experience of the past as well as the needs of the present, point out a simple and easy mode of settlement. Let Congress pass a bill, reciting the expediency of removing all doubt on the subject, ratifying the acts of the President on the ground of urgent necessity, indemnifying him and all of his officers for all arrests heretofore made, and suspending the privilege of the writ of Habeas Corpus during the war.

These and other elements in the instrument of Executive power invented by the Constitution, in which it differs from the English model, are yet to be tested by time. An English King occupies the highest station, social and political, in the realm. He holds his place for life by inheritance, by legal right, and is under no obligations for it to a party or to the people. His right is vested before he is crowned, and can only be divested by a revolution. He represents the dignity

and power of the nation at home and abroad. The people are his "subjects." The island, its colonies and dependencies are his "dominions." All the officers, civil and military, are his "servants," of whom he is the "august master." The army and navy belong to his "majesty," and all executive acts of Government are done by his "command." He is lapped in splendor and luxury; he is encompassed by pomp and ceremony; he is clothed with the prestige of antiquity, and his throne and crown are lustrous with the gems of national tradition and glory. He has therefore great social influence, and political influence also, according to his talents and ambition, but he has no real political power. Gradually and cautiously that has been taken from him by the free spirit of the people, and lodged where it is under their control. Power is given to the Ministers, who, though appointed by the King and removable by the King, are also members of the Legislature, and as they cannot carry on the Government without the aid of the Legislature, the Crown is under the necessity of selecting Ministers agreeable to it.

The result of all this unique machinery, the slow growth of ages, is manifold. Executive power is subjected to Legislative, and thus mediately to public opinion, whilst the person who wields it, not being chosen by the people, and affected only indirectly by an election, is not likely to become a partisan leader or demagogue. He is never a candidate, cannot therefore promise office and emolument to active adherents, and thus corruptly influence elections. His term of office is uncertain, as he can be removed directly by the Crown and indirectly by Parliament, and therefore he cannot, supported by a faction, set both at defiance during a period fixed by law. The power moreover is not exercised by one person, but by several, who share its authority and responsibility, who form indeed an Executive Council. A position so checked and limited, though a worthy object of honorable ambition, is not likely to become either the object or the instrument of criminal ambition. It would not satisfy a Cæsar or a Napoleon, nor could it be for them a stepping-stone to a higher seat. The sword and the ballot-box, the hustings and the battle-field are

the appropriate weapons and spheres of such men, and it is to preserve liberty from such that the English Constitution was created.

The Monarch, not the Minister, holds the highest place in the kingdom. He is invested with rank, influence, splendor, and he has them all for life. The English Throne, representing the majesty and nationality of the English people, is surrounded by everything that can tempt worldly ambition, and for that reason it is jealously guarded against worldly ambition. The person to fill it is ascertained beforehand by law. Birth chooses the king, not talents, character or personal qualities of any kind. Were it otherwise, such a prize would become the object of prominent men and powerful parties, and the death of the Monarch would be the signal of civil war, or if its possession depended on an election, of a contest almost as dangerous as civil war, and very likely to lead to one. The terrible risks of a disputed succession, of revolution and anarchy, are thus avoided, for the succession will always be disputed if at all doubtful. Herein lies the philosophy of the hereditary principle of the English Government. It prevents civil war and revolution, of which the English people have had some bitter experience, is therefore upheld by them with reverence and loyal tenacity, and therefore too, whilst depriving the Crown of power over their liberties, they have lavished upon it everything else that pride and affection can bestow.

Not in England only, however, is the hereditary principle cherished, and for the same reason,—to prevent a contest for the place of supreme power and dignity, even by an election; for the struggle caused by such a prize is likely to be too exciting to be settled by a count of votes. Even France, learned in revolutions and professing democracy, has been forced to adopt the hereditary principle, to avoid the horrors and dangers of both. The old Royalty and the old King were killed by the Jacobins. When the fever-fit was over, it was found that neither could by any process be restored to life, but only, by galvanic battery, into short, hideous show of life. The old feudal monarchy and the Bourbons, who could neither learn

anything nor forget anything, were behind the age. The age or the French people, however, were not up to a Republic, not even to a limited monarchy,—that is to say, to an Executive power subordinate to the Legislative. Their Celtic blood demanded the one man power or despotism. They got a very splendid despotism, but soon reflected that their despot was not immortal, and therefore at his death, somebody else would be eager to fight for the place he had won by fighting, and thus the miseries of the Revolution would be renewed. They therefore attempted to found a new dynasty of Bonapartes,—not feudal, but popular. The despot was not King of France, but Emperor of the French. The attempt failed,—for the time, at least. The continuity of the dynasty was broken by the overthrow of the Emperor, by an effort to revive the old monarchy, by an effort to establish a modern limited monarchy, by another vain effort to get up a Republic, and now, at length, after much bloodshed and disorder, the Celtic nature of the French has brought them back again to a popular despotism and a Bonaparte.

Taught by accumulated experience the woes of revolution, France, in order to escape from them, has already engrafted the hereditary principle on its second despotism; nay, to make it stronger, has declared that it exists only by virtue of the hereditary principle infused into the first,—thus giving it a little root in the past. Louis Napoleon is Napoleon III, the Government of the Empire founded by Napoleon I having never legally ceased to exist, notwithstanding the interruptions of feudalism, limited monarchy, and republicanism. France, therefore, tormented by memories of past anarchy and fearful of its recurrence, has been twice obliged to turn for refuge to the dark and gloomy shelter of hereditary despotism; in other words, to arbitrary Executive power, which the people do not confer, in the administration of which they do not participate, and which is hereafter to be wielded by one who, if he possesses either talents or virtues, is at best a happy accident.

What a history, and what fearful tales of human suffering does it not imply! First a corrupt, decayed, effete monarchy

and aristocracy, which had grown away and apart from the people, and therefore wanted the sap of life, overturned by a revolution inspired by great and noble thoughts and sentiments; then democracy, producing anarchy; and then, as a refuge from that, military despotism; then long, exhausting and horrible wars, growing out of the despotism; then conquest and the past put forcibly back by the enemy; then spasmodic efforts to find some safe means,—some *juste milieu*,—between the disorders of democracy and the degradation of despotism; then democracy again, and anarchy; and then, again, a despot, and the humiliation of being governed by will and not by law, with all noble hearts embittered by vain longings for liberty, for which so many costly sacrifices had been made in vain, with present tranquillity and material prosperity dependent on the life and conduct of the present Emperor, and the future dark as before with lowering clouds.

Very different during the same period has been the history of England. The cause of the difference is to be found, not in political institutions, but in the inherent qualities of the English and French people; for out of these do principles and forms of government grow. Each began with feudalism, from which France broke violently away, and, through bloodshed, violence, terror and crime, reached military despotism; whilst England, by slow and peaceful changes, with steady advance in prosperity and power, has built up a Constitution which combines in a harmonious whole republicanism without democracy, an aristocracy interwoven with the blood, business, interests and affections of all classes of the people, and an Executive power which unites hereditary rank and regal magnificence with the authority of a Chief Magistrate controlled by the Legislature. This Constitution was impossible for France. It is the outgrowth of the genius of the Saxon race, and expresses its character.

Our ancestors brought its principles across the Atlantic with them, because they brought their Saxon blood and native love for liberty, order and law. They could not bring the forms of the Constitution, for some of them were inconsistent with the new circumstances in which they were placed. They

could not bring royalty and the hereditary principle. They were obliged to leave these out of their plan. The organization of the Executive department was the most difficult task of the Convention. Many schemes were offered. An Executive Council; a President chosen by the Legislature; a President for life, and for longer and shorter terms were severally proposed and discussed. At length the Convention decided on a President to hold office for four years, chosen, not directly by the people, but by an Electoral College selected by them. He has neither rank, title nor splendor, but he has substantial power, and is very like what an English Prime Minister would be if the monarchy were abolished and he were elected by the people for a term of years. It is obvious that Executive power so lodged exposes the country to all the perils avoided by the English system, of an hereditary, irresponsible King, combined with a responsible and removable ministry appointed by the King. The highest political position is thrown before the people as a prize for contending parties led on by ambitious men. All the passions of a popular election are periodically brought into action and stimulated by a stake of immense importance, representing the innumerable private interests influenced by Executive patronage, the interests and rivalry of classes and of sections, and the principles, often the exasperated passions, of political parties.

Such a process, repeated at short intervals, supposes, and to be safe requires, great general intelligence among the people, and great order and fairness in the manner of conducting elections. It requires, also, as an essential condition, the quiet acquiescence of the whole people in the result of an election.

The defeated party must submit peaceably, otherwise the evils of a disputed succession, which is nothing less than civil war, will surely follow. The ballot-box is the American substitute for the European principle of hereditary right. The ballot-box designates the person entitled to possess the coveted bauble of power here, just as birth does in England and elsewhere. But if the decision of an election be disregarded, then would commence the reign of violence here just as it

would in England were an attempt made to set aside the lawful heir to the Crown.

Since the adoption of the Constitution we have had sixteen Presidents; and though it cannot be said that the elections have been entirely free from fraud and violence, they have not been marked by flagrant or dangerous examples of either. But we have already reached a period when the decision of the ballot-box has been forcibly resisted. A powerful party and section threatened to overturn the Government should a President be elected not chosen by themselves. They have kept their promise. We are now in the midst of a civil war growing out of a disputed succession, and one of the defeated candidates is at this moment in arms against the Government, to whose highest office he dared to aspire, with that threat hot on his lips. Our elective monarchy—for the President has all the power of an English ministry, and more than the power of an English King—has failed to maintain the tranquillity of the country and save it from rebellion and attempted revolution. It is still on trial. Perhaps the present war, by establishing the principle that the ballot-box must be obeyed, may place the Executive branch of the Government on a surer basis.

If it be important that the manner in which the chief Executive officer of a Government is chosen, be such, as not to endanger its existence or the peace of society, the choice made is no less important. Power in weak or wicked hands is a dangerous thing, against reason, and a sad and monstrous spectacle under the sun, however often exhibited. The natural allies of power are wisdom and goodness, and only when so allied is its influence benign. Integrity and a certain degree of ability are conditions essential to the Executive office. How to secure them is the difficult question. In hereditary monarchies, where the King exercises substantial power, the qualities which are to direct that power depend on the accident of birth. There is always a chance that he may be wholly incompetent. Probabilities are, however, much in favor of his possessing average ability, and that what is weak in him will be supported, what is evil restrained, what is good

developed, by a careful education, by his obvious interest, by custom and tradition, by wise advisers and by public opinion. Should all these fail, he cannot live forever; and the evil that he can inflict, Europe thinks, may well be borne during one short life, for the sake of the security afforded by the hereditary system, from the dreaded miseries of revolution.

The English Constitution, as already mentioned, avoids this danger by means of the hereditary element, but it does not leave to chance the selection of the person who is to exercise Executive power. By contrivance wonderful as the roots and branches and leaves of a tree, that person is both a legislator and a member of an Executive Council, and, clothed with power, is also subjected to duty and responsibility. He is appointed by one who never dies, and who, because of this legal earthly immortality has every earthly motive to make a good appointment and no possible motive to make a bad one, and moreover must, under any ordinary circumstances, make a selection from a small circle of eminent men, known to the nation. By this same incarnation of permanent authority, the person thus chosen may be removed, but from the workings of other parts of the system, it is almost impossible that he should be so removed for any but the gravest reasons. Whilst the appointing power is placed above temptation, it has the best means of becoming acquainted with the talents and character of distinguished men likely to aspire to high stations and worthy to fill them. Finally, when the choice is made, the person chosen must resign his place unless he can satisfy the judgment of the most intelligent, highly educated, critical, fastidious and thoroughly practical assembly of men on earth, the British Parliament, representing the enlightened opinion of a people jealous of liberty, rich in the treasures of long civilization, and haughty with the pride of ancient power and glory.

These are severe tests. If they cannot always secure the choice of the best men, they will be sure to prevent the selection of very bad ones, or speedily to get rid of such, if selected. They form against tribunitian arts, demagogueism and military heroism, a barrier which cannot be easily undermined or overthrown. It would foil the cunning of a Cati-

line and repel the genius of a Napoleon, as British bayonets repelled his magnificent charges at Waterloo. The true character of the Executive branch of the English Government must be judged, not from the list of its Kings and Queens, though that has illustrious names, but of its ministers. These exhibit an array of ability and integrity, not surpassed, if equalled, in the annals of any other nation.

They are certainly not surpassed by our own. It is a plausible theory that a people fit for freedom ought to have the privilege of choosing the magistrate who is to exercise their power and represent their nationality; also, that to prevent abuses and avoid the ill consequences of their own mistaken choice, they should be able to exercise this privilege at short intervals. But it is rash to predicate of the masses of any nation, sufficient intelligence and discretion to make a judicious choice, and it is expecting much to impose upon them this difficult task every four years, for they are proverbially apt to be led astray by false lights, easily deceived and easily influenced by passion. The heart of the people responds quickly to great virtues when displayed on some difficult emergency. But unless so displayed, the multitude cannot recognize talents or high moral qualities and are prone to be deluded by pretension and falsehood. They are open to flattery and easily led by a plausible tongue to indulge extravagant hopes of visionary good. They are peculiarly susceptible to party spirit and readily become passionate and obstinate partisans, sticking to a dogma and to a leader, right or wrong, for the sake of victory.

For these reasons party leaders and demagogues often obtain complete control of the masses, direct their thoughts and will, and dictate their principles and their votes, unless when a great crisis, like the present, rouses the nation from its normal state by violent crimes and imminent dangers. Then, if any healthy life be left in the people, they rise together and rally round their flag and their country, and whoever can best serve both, and they forget party ties and spurn old leaders, as they are now doing here. But the rock must be struck a hard blow by the divine rod of suf-

fering and peril before such waters flow. Noble sentiment and mental energy are not produced by peace and plenty, but instead, apathy among the people and corruption in the state; mobs and demagogues, misrule, sedition, rebellion and revolution. A Constitution should prevent these evils by founding its provisions upon the real character and habitual conduct of the nation to be governed by it, otherwise it must fail. The interests involved in the choice of a President are a valuable freight to be trusted, and at short intervals, to the billows of so uncertain a sea as the fluctuating opinions and passions of the ignorant and mutable many.

Our ancestors did not intend so to trust them. They did not intend that the President should be elected directly by the people, but that he should be the "chosen of the chosen." They interposed between the President and the people an Electoral College, subjected to many conservative restraints and provisions to prevent intrigue, and to shield it from the influence of popular folly and passion. The President was meant to be the choice of the electors,—not of the people,—and the former are not elected by the people, but appointed by the States, in the manner directed by the Legislatures thereof. These provisions manifest a desire to avoid the dangers of a popular election for an office wherewith interests so important and topics so exciting are necessarily connected.

To determine the mode by which the President should be appointed was the most difficult and delicate task before the Convention, for it was that part of their work in which they had least assistance from the past. The English model was out of the question. Any leaning towards it, in the existing temper of the people, would have endangered the ratification of the Constitution, while granting too much to the excited democratic tendencies of the hour would have insured its failure in practice. The Convention went as far as they dared in favor of conservative principles, though not so far as some of them desired. The wisest among them had serious doubts and

misgivings, not so much as to the power conferred on the President, but as to the manner in which he is chosen and the duration of his term of office, both of which might involve it in the dangerous vortex of popular passion, in which terrible maelstrom the Constitution might also be engulfed. Much, evidently, was hoped from the electors, as is clear from the following remarks of Mr. Hamilton in the Federalist, No. 58:

"It is desirable that the sense of the people should operate in the choice of the person to whom so important a trust is to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose and at the particular juncture.

"It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most apt to possess the information and discernment requisite to so complicated an investigation.

"It was also peculiarly desirable to afford as little opportunity as possible to turmoil and disorder. This evil was not least to be dreaded in the election of a magistrate who was to have so important an agency in the administration of the Government. But the precautions which have been so happily concerted in the system promise an effectual security against this mischief. The choice of *several*, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements than the choice of *one*, who was himself to be the final object of the public wishes. . . . Nothing was more to be desired than that every practicable obstacle should be opposed to *cabal*, *intrigue* and *corruption*. These most deadly enemies of republican government might naturally have been expected to make their approaches from more than one quarter. . . . But the Convention have guarded against all dangers of this sort with the most provident and judicious attention. They have not made

the appointment of the President to depend on *pre-existing bodies of men*, who *might be tampered with* beforehand to prostitute their votes, but they have referred it in the first instance to an immediate act of the American people, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who, from situation, might be suspected of great devotion to the President in office. *No Senator or Representative, or other person holding a place of trust or profit under the United States*, can be of the number of the electors. Thus, without corrupting the body of the people, the immediate agents of the election will at least enter upon the task free from any sinister bias."

These passages, whilst they indicate a full sense of the dangers of a popular election, show also how much the Convention trusted to the electoral body they had provided, as a restraining influence upon the rash impulses of the masses, and a discriminating power to winnow their opinions from the chaff of ignorance, folly and passion. They prove, also, that the Convention had before their minds the English Ministry as their model, and followed it as closely as they could with the materials at their disposal. They endeavored to place the power of choosing the chief Executive officer in hands elevated as far as possible above intrigue, corruption, and party spirit, and at the same time to subject him to the indirect control of the people. They failed, and their failure is a signal instance of the impotence of a written Constitution that does not accord with the spirit and tendencies of the people,—of the certainty that it will become the instrument of these.

It is surprising that the Convention did not foresee the failure of their plan, as the expedient, immediately adopted, of choosing electors pledged to support a particular candidate, was so obvious that it might well have been anticipated. The Constitution had scarcely been set in motion, before the electors became a mere form, chosen without the slightest reference to their character, and exclusively as the organ of the popular will. They have no power of deliberation or choice whatever, and their sole province is to register the popular vote.

This conservative element of the Constitution has thus been utterly abolished, and our history shows, that every evil and danger against which it was intended to guard, has occurred. President-making has become the vice of our politics, a moral nuisance and calamity to the nation. It is the trade of a vast number of energetic and clever men scattered throughout the country, trained to the business, and accomplished in all its mysteries. It goes on without cessation or pause all the time, waxing in eagerness, bustle and fury as the time of choice draws near. A successful candidate is scarcely installed ere the game for the succession commences. Parties muster their forces, prepare their "platforms," invent their "cries," fabricate their fallacies, appoint their agitators and indicate their candidates. As time advances all the arts of the demagogue are put in requisition. Itinerant speakers fulmine through the land. The press pours forth its constant fire of argument and appeal, corruption does its secret work, and when the day of trial comes, the ballot-box manipulator plies too often his skilful finger, and the rowdy club domineers sometimes over the hustings. It is an animating spectacle, with much of evil in it and much of good. Such a contest elicits a vast amount of able discussion, and through the press increases the power of enlightened opinion. It develops talent in every class of life, educates the people to habits of thought on important questions, and inspires them with the sense of personal consequence and self-respect, caused by a participation in the control of great public interests.

It is easy to imagine a community so intelligent and moral, as to be able to pass safely through such oft-repeated ordeals. In many parts of our country this ideal state really exists, but not in all, not especially in great cities, the centres of wealth, population and power. The dangers of such a contest are likely to increase with numbers, with the augmenting bulk of the interests of classes and sections, with the momentum of the masses set in motion, and with the steady growth of ignorance, pauperism and crime, for these do grow with fearful speed in the midst of our fair and advancing civilization. We are now thirty millions, supposing we can retain the South.

In a little while we shall be fifty or sixty millions, with all the enormous accumulation and variety of interests which our rapid pace in prosperity implies. An election by universal suffrage, every four years, by sixty millions of people, divided into parties by conflicting interests and principles, with their passions sedulously fanned into flame by ambitious leaders, is a spectacle that staggers the imagination. It may be among the possibilities of the future, a triumph reserved for improved culture and knowledge, but the past offers no such example.

The election of a President directly by the people, was not intended by the Convention. They provided the shield of the electoral colleges for the express purpose of preventing it. The frustration of their design has proved the means of defeating their intention in another provision of the Constitution, and of thus bringing to bear upon a Presidential, and indeed, all other elections, a tremendous engine of corruption, which increases their danger a hundred fold. The power of appointment to all offices of Government is conferred on the President, subject to the confirmation of the Senate. The power also of removing from office without consulting the Senate, was soon claimed and obtained by the Executive, though not conferred by the Constitution, and thus the patronage was greatly increased, and Congress, also in violation of the Constitution, exposed to its corrupting effects. Practically the President exercises the whole patronage of the Government. The Convention intended to bestow this immense and ever growing influence on a President chosen by boards of electors, whom they guarded in every possible way from that influence. But the electors turned out to be a nullity. For them the masses of the people have been substituted, and upon these the whole blighting force of the patronage can be exercised, and there is nothing in the Constitution to prevent it.

The temptation has proved too great to be resisted. The patronage has been used to control elections without scruple, shame, remorse or moderation. It has become a settled practice so to employ it, which time and skill have organized into an elaborate system of corruption, that pours its poison not only in broad streams among the superior classes, but by little

rivulets into every nook of society, for a vote is a vote, whether given by the high or the humble, and small offices are the prize of the humble. The number of offices in the gift of the President is not the true measure of the power of this formidable instrument. The President who is in, uses it to retain his place for himself or his party. The candidates use it to stimulate the efforts of their followers by promised reward. So that each office influences at least two persons. To these must be added two or three aspirants for each, and two or three of the friends of each aspirant. As the Presidential election is always the absorbing party question, it of course controls the patronage of the State Governments and of all municipalities, and decides the appointment not only of Cabinet, ministers and foreign ambassadors, but of obscure postmasters in log shanties of the West, and of policemen and street-cleaners in the cities. "To the victors belong the spoils," has become the established maxim of party politics, and it is unsparingly carried out. An immense force numbering hundreds of thousands, composed of office-holders and office-seekers, organized, disciplined and trained for the work, is thus enlisted for the express purpose of carrying the election of a President.

Such a corps of mercenaries cannot be the best judges of the talents and character required for the office, or very scrupulous about the means they employ to gain their ends. A wise choice and a fair election are not likely to be the result of such a system. Clearly it is a system not intended by the Constitution. It has evil consequences, however, apart from the injudicious choice of a President. It corrupts the people by offering to many thousands sordid motives for what should be a moral act, by lowering the standard of public virtue, and by introducing the contagious example of dishonesty in high station. Such things cannot be done with impunity, and we see the consequences in a flood of corruption that has inundated the Government, and which even the high emotions and patriotic feelings called forth by a noble cause and a great war cannot check.

Another curious result has grown out of the failure of the

board of electors to play their prescribed part. A clumsy substitute for them has become necessary. The Convention intended the people to elect a President, not directly but indirectly, and they were wise in this, for other reasons besides those already mentioned. That a President, or indeed any other officer, should really be chosen by the people of a populous nation occupying a vast territory, is simply a physical and psychological impossibility. They cannot in the nature of things spontaneously elect candidates, each man acting for himself. There must be concert and conference. These create parties, and parties must have managers, leaders, organs who represent, guide and express opinion. Such guides necessarily nominate the candidate of a party, and the members of the party must vote for him, or for the candidate of the opposite party, or not vote at all, although perhaps many would gladly choose some one else. Hence, therefore, a nomination by the stronger party is the real election, and those who make the nomination are the true electors.

Out of this necessity, nominating conventions chosen by the several political parties have grown up, and they do, in fact, make our Presidents. These conventions perform practically the part assigned by the Constitution to the electors. The latter were indeed intended to appoint a President, and the conventions choose candidates only, but as the people must vote for these candidates, or not vote at all, so far as freedom of choice is concerned, the result is the same. In all other respects, however, it is very different.

The nominating conventions are bodies unknown to the law, and therefore uncontrolled by the law. They are surrounded by none of the restraints that insure fairness and intelligence, imposed by the Constitution on the electors. The conventions are irresponsible bodies, chosen by no rules except party rules. No law prescribes the numbers or qualifications of the members, or defines their powers and duties, or appoints the time or place or manner of their election. No one neglects a duty by omitting to vote for them. It is not always easy to find out how or where or when to vote. To discover these things, application must be made to the initiated. The con-

ventions meet when and where they please. They not only nominate candidates, but they announce doctrines and principles on the most momentous national questions, which they call platforms. Their decrees are of no legal authority, but are yet of such force, that they must be obeyed on pain of virtual disfranchisement. They so manage it, that a man must vote for their nominees, or not vote at all, and vote for all the dogmas of their platforms, or not vote at all.

It is their obvious policy, indeed, to put forth principles that are generally acceptable to their party and candidates that shall be available, that is to say, popular and likely to secure the votes of their party. In this rude way the sense and wishes of the people may get expressed and executed, though inadequately. It constantly happens that some of the principles of a "platform" are distasteful to many, who must, nevertheless, swallow them or give up those which they do approve, and more often, that the men nominated are disliked by numbers who must, nevertheless, accept them or refuse to support by their votes their most cherished opinions. It thus happens that the sanction of a majority is given to men and measures which a portion only of that majority approve.

It may be said, indeed, that these defects are incident to any mode of ascertaining the wishes of the people, for proximate results can be expected only, and that the plan presented in the Constitution would have been liable to the same objections. True, perhaps to the same, though not to the same extent. The electors are voted for by the whole people. Their power and duties are defined by the law and their members amenable to the law. Certain classes of persons cannot be chosen. They are not like the nominating conventions, irresponsible conclaves, surrounded by secrecy and mystery, managed by politicians with private ends to serve, and thus open to every sort of intrigue and mischievous influence, against which the constitutional structure of the electors carefully provided.

The plan in the Constitution failed. It fell flat before the democratic element of the country, because it apparently withheld from the people the direct choice of the President.

Another has been substituted for it, because apparently, it gives the election to the people, though in reality it does no such thing. Had the Constitution imposed on the electoral colleges the duty of choosing *candidates* for the Presidency, the plan would perhaps have been successful. There would then have been an appeal to the people from their decision, and the electors, restrained from the abuse of power by the careful provisions of the law, would have done what nominating Conventions now do, without such restraint.

We have had some experience of their operation. It cannot be said that they have elevated the tone of our politics or the character of our public men; that they have exerted a salutary influence on the morals or manners of the people, or a wholesome control over the arts of demagogues and the excesses of party spirit. Neither can we boast of the candidates these President-making machines have nominated and put in power. The very names of some of them have become offensive, and very few of them have inspired confidence and respect. It is not much to the credit of the nominating machine that it ground out Mr. Lincoln, for it, at the very same time, produced Mr. Breckinridge. Mr. Lincoln was an accident, and the apparatus which turned up his name had before given us Polk, Pierce and Buchanan. Mr. Lincoln was not really chosen by the people, not even by those who voted for him. After having been chosen by others he was elected as the representative of certain opinions. Until he was nominated, not one in a thousand ever heard of him, or after he was nominated and elected, knew what manner of man he was, until he made his inaugural speech. Then, indeed, he revealed himself, much to the relief of anxious multitudes of his supporters. Before that, however, he had been illustrious neither by important public services nor by the display of shining abilities. Strangely enough it was for that very reason that he was nominated, whilst Mr. Seward, whose name was distinguished, whose eminent talents were known to the country and who had long been the leader, if not the creator of his party, was, for those reasons, dropped. A capricious machine, one would say, this nominating Conven-

tion, and governed by mysterious principles, known perhaps to those who work it, but to none others. Certainly it is not one made by those who made the Constitution, or one they would willingly have adopted. Surely, also, they never could have anticipated its odd performances, if we may judge from the words of Hamilton, quoted above. How strangely they sound to us now.

"It will not be too strong to say that there will be a constant probability of seeing the Presidency filled by characters pre-eminent for ability and virtue."

Is it possible to read them without shame and alarm? The nominating conventions have not only given weak and wicked, and ignorant and foolish Presidents, but they have also given us civil war, or rather, they gave us in Mr. Buchanan a President who might have prevented a civil war, had he possessed the requisite honesty, ability and courage. His official power was adequate to the purpose. But he was a mere partisan. He owed his place to the rebels, their chief men were his own trusted advisers and officers up to the moment of turning against the Government, and he himself had diligently fostered the pernicious crop of false doctrines and arbitrary measures, which, under his auspices, ripened to a harvest of treason. The seeds of that crop had been as diligently planted and guanoed by his predecessor General Pierce. General Pierce was also a product of the nominating machine, chosen, too, because he was unknown to the people.

It is thus clear that the proper organization of Executive power is a problem yet to be solved. We have abolished that given to us in the Constitution, and our substitute has failed to furnish worthy men for the office; it has been the prolific source of corruption; it has not saved us, when it might, from sedition and civil war. Unless it can be altered and improved, its dangerous tendencies will acquire force and impetus with the increase of population, wealth, and national expenditure. If eighty millions a year gave us the corruption of the last

administration, what are two hundred millions likely to cause hereafter? Such a prize will not render the elections more orderly or the councils of nominating conventions more pure. We are likely to have "military heroes" as aspirants for the Presidency, and large armies either in the field or recently disbanded; and these facts do not diminish the perils of the future. The past performances of nominating conventions have not inspired the people with much respect, and it is doubtful if they can be safely trusted hereafter. Unless in some way the Executive power can be modified, there is reason to fear that it may destroy the Government. It would be wiser to change it, by taking thought beforehand, than to have it changed by convulsive events.

If we could be taught by present bitter experience a more discreet use of the elective franchise, the present system could be made to work well, as indeed any system will work well, directed by an intelligent and virtuous people. Nominating conventions might be made useful and safe representatives of opinion, if the people would determine that they should be such. They have in them germs and possibilities of good, and even now are not wholly evil. Why cannot they be regulated by law, and their mischievous tendencies restrained? They have become an institution of formidable power, and should therefore be made amenable to legal authority. Perhaps this war may settle one essential principle,—that the decision of the ballot-box must be submitted to. Perhaps public opinion, instructed by past enormities, may be able to control the gross abuse of Executive patronage, and require the nomination, by parties, of men of ability and good character,—not of demagogues. But let us avoid rash and sudden changes. Let us keep what we can of the work of the Convention, and bring it back as near as we can to what they intended. Should experience show that their work is unable to satisfy our new wants, let us alter it with reverential deliberation and care, and only where alteration is necessary and when it is necessary.

Should our Union be restored, and this country become what we hope and intend to make it,—a great Empire of republican

liberty,—some changes in the organic law of the Government may be required. If civilization means anything,—if science and literature, schools and a free press, and representative institutions have any virtue,—these changes will be made by thought, and not by force. The necessity will invoke American ingenuity to invent an Executive machine that will supply the American demand for order, liberty, and national safety, just as the size of the cotton crop created the cotton gin, our immense grain-fields the reaper, our vast expanses of territory the steamboat, the railroad, and the telegraph, and the exigencies of the present war the Monitor and Merrimac, which are destined to work as great marvels in naval warfare as the former have done in commerce and the arts. Liberty, order, security and national power we must have. Our Saxon nature demands them all, and demands them all without Royalty or regal splendor, hereditary rank or a privileged class. The English have contrived gradually to convert a feudal monarchy into a monarchical republic, and instead of a haughty Henry VIII or imperious Elizabeth, live now under the mild sway of an amiable and domestic Victoria, dressed in crinoline, and a good-natured and harmless Palmerston, decorated with red tape. In like manner, the genius of our kindred race, stimulated by the needs of time, will surely be able so to mould and modify the instrument of Executive power fashioned for us by our fathers, that it may become strong enough for our safety, yet not too strong for our liberty; serviceable for the public good,—not pliable, to serve private ends; republican, without the license of democracy; steadfast, but not immovable; and, whilst responsive to the sober thought and advancing spirit of the age, firm to resist Utopian schemes of change and the reckless passions of revolution.

# CHAPTER IV.

## SLAVERY.

ANOTHER novelty put by force of inexorable circumstances into our Constitution was slavery, and not slavery only, but the African slave trade. The latter was protected for twenty years, the former forever; and to render it secure was interwoven with the most important functions of government, with representation and taxation. When the Constitution was formed, slavery existed in nearly all the States; but it was a plant not suited to a Northern climate, and therefore it did not flourish in the North. It did suit the South, because the climate suited the negro. He grew there with prolific luxuriance, as he did in his native Africa. The hot sun of the South, which invigorated the black race, weakened the white, indisposed it to labor, made it willing to be labored for and served. Having the intellectual superiority and force of character, and thence the power, the white man made the black his servant. Out of the toil of the negro, grew the wealth of the South, and out of his natural, and therefore permanent, inferiority to the white man, coupled with his docility, grew up the structure of Southern society. The material prosperity of the South, its manners, habits, institutions and essential conditions and characteristics, were thus, then as now, founded on slavery and the negro, and on slavery because of the negro.

A government, therefore, for the Union that did not give some sanction and protection to slavery was impossible. On no other terms would all of the Southern States have entered the Union. They were not content even with slavery, but, wanting more negroes for their extensive tracts of fertility, stipulated for the privilege of importing slaves from Africa for a limited period. They would not be refused, and could

not without giving up the Union, so important to the safety and interest of both North and South, and the hopes so dear to both of founding a great nation. The terms of the South were granted, but with much reluctance. It was difficult for the leading minds of the Convention to accept slavery as part and parcel of a Constitution intended to establish freedom, or to blot and blemish it with a thing so odious as the slave trade, then beginning to attract the indignant notice of advancing civilization.

The slave trade regarded negroes as merchandise, and so did the laws of the South; but the former, besides its attendant barbarities, converted freemen into slaves, whilst the latter merely prevented slaves from becoming freemen. Humanity and the North gained a qualified triumph by the clause in the Constitution providing, by implication, that the Government may (not shall) prohibit the importation of slaves after the year 1808. Slavery was accepted per force, yet what could be done was done to deprive it of its most repulsive feature, and to clothe its ugly nakedness in the decent robes of humanity and justice. Slaves were called "persons" in the Constitution wherever alluded to, and this word, both in its technical and popular meaning, is used in opposition to things and excludes the idea of property. The Convention did not mean expressly to exclude that idea, for slaves, even as property, are persons held to service, but they used language applicable to them both as property and as men, but more peculiarly and properly applicable to the relation of master and servant for life, which is a very different thing in its moral aspect and legal consequences, in its influences and its results, from the relation of owner and thing owned, which is the principle of the slave trade and of Southern laws.

With difficulty did our fathers yield to expediency and bring themselves to deface the fair Constitution they were writing, by provisions to protect and perpetuate human bondage. Their repugnance is shown by the words they employed. Nowhere is slavery mentioned, or property in slaves or the negro race. A stranger to the history of the Constitution could never gather from any of its phrases that either of these

were referred to or had existence in the country. In the clause establishing the ratio of taxation and representation, after an enumeration of different classes, slaves are spoken of as "all other persons." In the section forbidding the prohibition of the slave trade before 1808, the slave hunt in Africa, the warfare of savage tribes to supply the market, the horrors of the middle passage and the revolting scenes of the slave auction, are all decently draped in these words: "The migration or importation of such *persons* as any of the States now existing shall think proper to admit." The provision for the return of fugitive slaves, describes the slave as a "person held to service or labor," and his master as "the party to whom such service or labor may be due." No one could tell from the Constitution itself that the word person, in either of these cases, meant negroes or slaves, except, perhaps, in the first, where persons "bound to service" for life are implied. The fugitive slave clause applies as well to apprentices, and under it possession of apprentices has been and may be recovered.

These ambiguous phrases were not used without a motive. They express the truth, then dawning on this subject, that as by the laws of nature there can be no such thing as property in man, so neither can there be by human laws. That the relation of master and slave is the relation of a man to a man, not of a man to a thing, and therefore imposes on the master duties and confers on the slave rights which, though he be a negro, a white man *is* bound to respect.

All the provisions in the Constitution in favor of slavery and the slave trade, were inserted to secure the adhesion of South Carolina, North Carolina and Georgia to the Union, and this reason was expressly stated in the debates of the Convention. Aversion to slavery was openly avowed, and though it was thought better to admit it than to exclude those States, Mr. Sherman and Mr. Madison declared it was wrong to use any language in the Constitution which implied that there "could be property in men." Most of their eminent contemporaries disapproved of slavery, lamented its existence, and looked forward hopefully to the day when it would disappear.

Believing that it would be temporary, and hoping that the Constitution they were making would be permanent, they wished it to descend to posterity without any visible stain to show the compromise they were forced to make with what they felt to be wrong.

They made a mistake. Do justice though the heavens fall. The Gods take care of the consequences of good deeds. The moral laws of the universe are on the side of the right, and the paths of truth, though apparently they lead through morasses of difficulty and rocky passes of danger, conduct us surely in the end to the promised land of safety and success. The Convention ought not to have violated conscience for the sake of the Union. They ought not to have given to slavery and the slave trade, seeing that they disapproved of both, the influence conferred by their sanction. These were both put into the Constitution, and sugar-coated as they might be by the decorous phrases used to describe them, their adoption implied approbation, and this was not true but false. They were not approved, either of them, but though the debates say so, the Constitution does not say so. The Convention was employed in a task that, from its nature, can rarely be the privilege of any assembly of men. They were founding a nation. They were building a government to endure for ages, the sheltering house and castle of posterity. Their hands were clean, their hearts were pure from selfish motives, but the accomplishment of their great purpose was a temptation too great for them. They could not bear to see it fail, and they hoped to secure its success by rejecting truth for one of its corner-stones and substituting a falsehood in the place of truth. They rejected freedom and they put in slavery, and worse than slavery, and they proclaimed to the world that they approved of slavery and the slave trade, which (pardon me, ye venerable shades,) was not the truth, but a lie. And what has been the consequence? The rejected stone has been a stumbling-block in our path ever since, over which we have at length fallen, and the inserted stones have crumbled to powder, so that the edifice has settled on one side, its walls are cracked and rent, and

the whole structure threatens to fall "in ruin with thunder" to the ground.

Wonderful is the action of Nemesis in human affairs. Slavery was accepted by the Convention for the sake of the Union, and slavery has assaulted the Union. Chiefly to propitiate South Carolina and Georgia was the sacrifice made, and South Carolina led the attack, followed immediately by Georgia.

Had the Convention sternly prohibited the slave trade, and refused to invest slavery with any power or influence, leaving it wholly to State laws, what evils, crimes and perils we should have escaped! It would have been better to allow South Carolina, North Carolina and Georgia to remain out of the Union forever, if they chose, though they would have been glad enough soon to come into it. The increase of the negro race in the South would not have been stimulated by twenty years of importation from Africa, the maxims and habits of that trade ceasing with it, slavery most probably would have been softened into a really domestic institution, and slaves have been regarded as men, not as merchandise. Probably also the Border States would, ere this, have followed the example of Northern emancipation, to which their climate and soil invite them, and slavery would never have risen into an overgrown, bloated power in the country, arrogantly claiming the right to rule or the right to destroy it.

It must be said in excuse for our ancestors, that though against their convictions of right they established slavery by the Constitution, they expected confidently that slavery would at some future day be abolished. This opinion and hope were by no means confined to the North, but were shared very generally by Southern slave-owners, who were the leading men of the Revolution. One of these was Washington. Their notions on the subject, however, were not very well defined or founded on adequate knowledge. Vague ideas of emancipation, amalgamation and colonization floated before their minds. The science of ethnology had not been born in their day, by which the nature of the negro and his true relation to the white man have been revealed. The laws of race render his equality with the latter by means of education impossible, and forbid amal-

gamation under penalty of degradation and degeneracy for the white. The same laws destroy all hope of colonization. The African has found in the semi-tropical climate of our Southern States a congenial home, grows there and multiplies faster than the Saxon, and his numbers speedily outstripped the means of the Government to send him away. The negro, moreover, has his affections. His attachment to place and the scenes of youth is strong. He loves his native land, which for those born here, is not Africa. He would not willingly go back to Africa. Force must be used to send him back, as force was originally used to bring him here, so that to export the negro would be almost as barbarous as it was to import him. Our ancestors therefore did not foresee that the negro race, for good or for evil, had seized upon a portion of this country as their inheritance forever. That in seventy years they would be four millions strong, and would go on to multiply with such rapidity, that before the Constitution was a century old, it might become a question which race is to possess the South, the white or the black.

Neither could any experience at that early day teach the Convention the lesson we have since learned of the contaminating influences of an inferior race. How it must in some way be held in subjection, and therefore irresponsible power, with all its baneful moral effects, be exercised by the superior race, producing thus a rank growth of cruelty, tyranny, arrogance, pride, sensuality and sloth! How a population semi-African must be semi-barbarous, and can make but slow progress in the arts, the industry, the science, the wealth and the power of civilization. Had our fathers when anxiously laboring for the future, seen painted upon it this fearful vision, would they not have said: "Let us erect what barriers we can, not against slavery, but against Africa. If this conquering negro race be so formidable because of its weakness, its unteachable ignorance, its tame docility; if thus armed with power to blight morals, to unnerve industry, to wither the intellect, and to blast, like the sirocco of its native deserts, the fair promises of culture and civilization; if it be irrevocably planted in our country, let us at least confine it in as narrow limits as we

can, and give what we can of our wide domain to the Saxon, and thus to progress in science, to freedom and Christianity. Let us import no more negroes. Let us discourage slavery, if that will check the growth of Africa in America, and if South and North Carolina and Georgia prefer slavery and Africa to the Union, let them depart, and enjoy both in peace."

Another thing not dreamt of in the philosophy of the Convention, yet destined to exert a powerful influence upon slavery, and through it upon the nation, was the cotton crop. It was found that the South contained the richest and most extensive tracts of cotton land in the world. Where cotton flourishes, so does the negro, but the strength of the white man is weakened by the climate. The cotton gin, invented by a New Englander, appeared, as such things do when needed, and enabled the planters to furnish the world with an article that soon increased the demands of commerce and manufactures by supplying them, and became in a few years the basis of an immense agriculture and an immense trade. Whilst the cotton gin enriched the South, it made cotton the sole foundation of its prosperity and power. With the value of cotton rose the value of negroes. Slavery thus formed an alliance not only with land as before, but with capital, throughout the civilized world, wherever looms, spindles and ships existed. When importations from Africa were forbidden, the price of negroes rose enormously in the Cotton States. To supply their market, the Northern Slave States became breeders of negroes, with large gains, much needed by the owners of worn-out lands, especially in Virginia. The mercenary element of slavery thus became predominant. Plans of emancipation that had been proposed and discussed were immediately laid aside, and slavery was fastened upon all parts of the South by fetters of gold. The South without cotton would be weak and poor. Cotton without negro labor would be impossible. The negro, therefore, and slavery, the one incapable of high civilization, and the other inconsistent with it, became the foundation-stones of the edifice of Southern society.

Whilst slavery thus grew stronger and stronger in the South, an enemy destined to cope with it and perhaps finally to destroy it, was growing in the North. The advancement of society in the useful arts and in wealth, brings with it the increase and diffusion of knowledge, and as a consequence, higher views of duty, and a finer sense of humanity. By this process government has been made free, laws robbed of cruelty, manners softened, and many practices once universal have come to be regarded as barbarisms of the past. About the time that our Constitution was adopted, the attention of the English Government and people was directed by a few earnest minds to the enormities of the slave trade. It was condemned as inconsistent with the intellectual culture and Christian morality of the country. These men were denounced and ridiculed as fanatics by the interests connected with the traffic, by the rich and noble, by the worldly and thoughtless, just as Abolitionists are denounced and vilified here now. But the fanatics were not discouraged. Though before their age, they were not so far before it that it could not follow their lead. Their words did not fall on barren minds and stony hearts, and though they fell among weeds and briers, the soil was good, and the divine seeds of justice and humanity took root, and sprung up into a crop that proved too strong for the weeds and briers. The result was, that the slave trade was abolished in England, and the same causes also operating here, it was abolished by Congress, as soon as the period appointed by the Constitution for its continuance expired.

It was impossible to condemn the slave trade, without in some degree condemning slavery. If it be wrong to make men slaves, why is it not wrong to keep them such? If it be wrong to rob men of themselves, and make them merchandise, why is it not wrong to buy and sell and use them as merchandise, not for their good, but for the profit of the owner? Whatever may be thought of this argument, moral sentiment and benevolent feeling were revolted and wounded alike in both cases, though not in the same degree. Success inspired hope, and led the reformers on to higher achievement. The movement had commenced, it was not suffered to flag, and being un-

checked by the hindrances of necessity, interest, manners and habits, either in England or in our Northern States, slavery ere long was abolished by both. These triumphs however did not satisfy either the opinion or the feeling that had gained them, which grew by indulgence.

The power of these forces was shown in the attempt to prevent the extension of slavery in this country, and they gained a partial victory by the Missouri Compromise. The reasoning on which that measure was founded applied also to slavery in the States. Unless slavery be an evil and a wrong, why prohibit it anywhere? or if it be both, why permit it? It is protected by the Constitution, was the answer. "But," said the reformers, "what are Constitutions compared to duty? Man's allegiance is due to something higher than the Constitution, which, if it command injustice, ought either to be altered or disobeyed. At least, let Government do what it can to clear the nation of this iniquity. Let it prevent the spread of slavery. Let it rescue from its blighting curse all the Territories, and the millions that are to make them populous. Let the Federal Capital be freed from so foul a scandal."

The motives of these pioneers were honest. They were governed, not by selfish interests, but by an idea, armed with which they ventured to attack selfish interests. They, too, declared that there could not be property in men. Subjection and servitude are, indeed, outgrowths of the negro's nature, as cotton is of the Southern soil, and are some, only, of the poisonous African fruits brought here with the negro. But chattel slavery is a different thing, and is not necessary. The zeal of the Abolitionists was contagious. They gained hearers and followers. They created a mass of opinion, which, as it waxed in strength, attracted the notice of the demagogues, who seized on it with avidity as political capital, as they appropriated and used slavery, its interests and its passions,—as they would seize on a piece of popular sentiment in favor of Mormonism, Mahometanism, or the worship of Juggernaut. Thus Abolitionism, commencing with the enthusiasm of a few, and stimulated by the sympathy of the like-minded

and by the persecution of enemies, throve, until at length it was marshalled and drilled by expert partisans, and became a political power, though a weak one.

The Southern people soon took the alarm. They saw that the fated hour was approaching, for their deadliest foe,—an idea,—had arrived, and they felt like rats in a barn when it is entered by a ferret. All material interests,—all worldly passions,—they had skilfully arrayed on their side. The forbearance of Europe was secured by cotton. The good will of the conservative interests of the North was gained by the interests of manufactures and commerce. The dangerous democracy, whose vital principle is so flatly contradicted by slavery, was entrapped by offering to it the delights of victory, and to its leaders the bribe of office and emolument.

But selfish interests do not rule the world, in the long run, though they may triumph for a season. The anti-slavery sentiment increased, and with it advanced with rapid strides the power of the North. Africa and cotton were no match for freedom, civilization, and the energetic genius of the Saxon race. In numbers, in all arts, in education, in wealth, in material resources, it soon became apparent that the strength of the country was with the North, and therefore that the North must rule. The position of the Southern people was not pleasant or hopeful. They beheld banded against them the opinion of the civilized world, and in the ranks of that hostile array they saw a portion of their own countrymen determined to destroy them. Their pride was insulted, their sensibilities were wounded by the incessant agitation of the subject of slavery. As it had become an element of party politics, Congress and the daily press rang with it, whilst a constant warfare was maintained by volleys of lectures, speeches, pamphlets, novels and periodical literature, grave and gay, in which slavery was held up to the execration of mankind as an abomination and a crime, and the Southern people described as rapidly sinking, because of it, into a slough of degradation and decay. Indignation and alarm greatly exaggerated both the force and the designs of the anti-slavery sentiment of the North, and imagination, artfully stimulated by political mana-

gers, painted the danger in colors and proportions far beyond the reality.

Thus excited, the South became thoroughly sectional. All thoughts and all passions centred in slavery, because on it their social system and property rested, and because it was menaced with destruction. How to meet the danger, was the difficult question. To their vision only two paths of safety remained open,—political equality with the North, to be secured by new Slave States carved out of the National Territory and out of Southern regions to be gained by conquest, and, should that fail, a separation from the Union.

For the success of the first they depended on their old ally the Democratic party. But they knew that however staunch and true the leaders of that party might be, and however well drilled and obedient a large portion of it, yet no political party is a constant quantity. Democracy itself might become infected with the poison of Abolitionism, and its ranks be thinned by desertion. What then can we do? Shall we submit to be ruled by our enemies,—to hold forever a position of inferiority,—to be a mark for the arrows of scorn, hemmed in on all sides by a cordon of free Saxon industry, and sure to grow weaker and weaker every day, in comparison with our strong and arrogant neighbor? We cannot stand this. We, too, are of Saxon blood. We have broad lands and fertile; we are rich and powerful; our cotton is necessary to the commerce of Europe, and will secure for us the alliance and protection of its chief nations. It has come to this. Because of slavery, we must either rule the nation or become ourselves a nation.

How the Southern people endeavored to carry out this scheme the history of the recent past and of the present moment will show, and to what fatal excesses they were led by the passions engendered by the contest. The Mexican war, the Ostend conference, the attempt to acquire Cuba by purchase or conquest, fillibusterism, the attacks upon Nicaragua, and the open encouragement and aid given to the buccaneers Lopez and Walker, mark their efforts to acquire a foreign area for slavery. The attempt to secure the national

territories was made in Kansas, and the border warfare waged against its people, the territorial legislature imposed on them by force of arms, the Lecompton Constitution sought to be thrust upon them by force of law, and the Dred Scott decision, will remain in our annals proofs of the fanatical desperation of the South, and of the enormities that may be committed with the sanction and aid of a free government in a civilized age and country.

All these efforts failed. We acquired, indeed, a large tract of land from Mexico, but it increased the power of the North; for it is not, and never can be, the home of slavery and the negro. The sentiment of the nation rose against fillibusterism; it could not be established as one of our institutions; it slowly receded, with its heroes, from view, and Cuba and Nicaragua were left in peace. The effort to secure Kansas was not only unsuccessful, but it overturned the Democratic party, and led to the election of Mr. Lincoln, a Northern man, by the vote of the North.

It was evident that the South could no longer govern the country. The sceptre had passed from their hands, after the wont of sceptres, to the place where it belonged; that is, to superior power. The time had therefore arrived when, if ever, the alternative part of the Southern plan must be executed; and the Southern men were not wanting to the occasion. The period was auspicious. The Democratic party was in power; the President, a friend and agent of approved fidelity. The chief offices of the Government were filled by Southern men. Much might be done during the few months of Mr. Buchanan's term, if the time was well employed. These advantages and opportunities were not neglected. The Government was stripped of its means of defence by the official authority of men who, at the time, were eating its bread, and who had sworn to obey it. In a whirlwind of passion, raised by the arts of politicians, State after State was precipitated into the measure of secession, with a haste that proved how much the leaders of the movement feared the sober reflection of the people. Forts, arsenals, navy-yards, mints, custom-houses, were seized by force; and when Mr. Lincoln

arrived in Washington, he found rebellion mustering its forces, which had been equipped with arms plundered from the Government by its own officers.

Meanwhile these proceedings had been making their appeal to the hearts of the Northern people. They were at first incredulous. It was difficult to believe that the weak South would venture to provoke a contest with Northern strength, or that any portion of this happy and prosperous country would be mad enough to attempt the overthrow of a Government which had been the source to all of nothing but benefits. As however the news spread into the country, away from the great cities, among the hills and valleys, the farms and villages, the spirit of the North became deeply stirred. The sentiment of nationality was roused, and the fires of patriotism spread swiftly, kindling all hearts, and waiting only an occasion and a signal to burst forth in the majestic wrath of a generous and insulted people. At length the audacity of the South culminated in the attack on Fort Sumter; and the cannon which they then dared to fire on the symbol of our country and of liberty, like the rifle volleys at Bunker Hill, struck a solemn and memorable hour on the great bell of time. As the latter proclaimed the birth of a great nation, so the rebel guns sounded the era of its regeneration.

How the President proved equal to the emergency; in what firm, grave, and temperate language he appealed for support to the people, and how gloriously they rallied round their flag, need not be told here. Neither is it my province to relate the incidents of the war. How, by miracles of energy and untaught ability, an army and navy were improvised and equipped out of nothing; raw recruits suddenly converted into ranks of soldiers, and able generals brought forth from the peaceful pursuits of business; or how, after a few checks and reverses, the power of the North has prevailed, and the rebels are now retreating before its victorious banners.* Whether victory will continue, or can restore the Union, cannot be foretold. This much, however, is certain:

* May 9th.

all the calculations of the Southern politicians who plotted this rebellion, have so far proved false. They could not secure the adhesion of the Border States, nor the alliance and aid of Europe. They have revealed the gigantic bulk and force of the Northern power which they ventured to provoke. They have renovated and united the national spirit of the Northern people. They have brought defeat and the desolation of war upon their own section; and that section must now take, either in or out of the Union, a position far less powerful than it had before.

The Southern people were guilty of fatal mistakes from the beginning. They greatly exaggerated their own importance and power, and did not appreciate at all the power of the North, arising, not alone from numbers and vast material wealth, but from the intellectual and moral forces generated by freedom, universal comfort, and education. As little did Southern men understand the true state of opinion in the North, which, though averse to slavery and to its extension, was also willing and determined to yield it all its constitutional rights. Exasperated by the torrents of argument and invective poured on them by the Abolitionists, they either could not or would not see, that these formed a small sect and a small party, and that slavery, guaranteed by the Constitution, was also amply protected by the patriotism, the good-will, and the interests of the Northern people, who loved and valued the Union, and for its sake were willing to tolerate and maintain slavery. Neither could they see that these were the only defences that slavery had in the world. Moreover, slavery had become the chief element of power to a great and generally victorious political party, who were determined to defend it, right or wrong, at all hazards. So far, therefore, from being in danger,—at least immediate danger,—from Northern opinion, Northern liberty, free thought, free speech, and a free press, were menaced by slavery. Fortunately, however, the Southern politicians saved us from this peril. No ingenuity could have devised a plan better fitted than that which they adopted to make the North abhor slavery, and the arrogant dictation of the South. They have associated both

forever with ideas of cruelty and tyranny, perfidy and treason. Kansas and Sumter will henceforth signify deliverance from these.

We have seen that slavery was put by force of circumstances into the Constitution, and that it has been the cause of a bold attempt to overthrow the Constitution. On this point, also, the Constitution is therefore on its trial. Are Union, the Constitution and slavery, things that can be combined into a harmonious whole, such as we can call a country and a Government? Should our victorious flag again fly over every part of the South; should the armies of rebellion be dispersed and the mock government of the "Confederate States" be convicted of being a lie and a sham, what shall we say about slavery to the deluded, devastated Southern people, when we invite them to return to their allegiance, when we tell them the Union has never been broken?

The question is difficult, and different views of it have powerful advocates in and out of Congress. It is said by some that, as slavery is the cause of the war, if we bring back slavery with the Southern States we shall bring back all the old issues, and with them strife, sedition, perhaps another war. These men, therefore, propose a sweeping act of emancipation as a war measure whilst we have the opportunity, since when the war is over, if the South returns, slavery will be protected by the Constitution. Let us now, they say, do justice to the negro, gain for our country the respect of the world, and destroy forever this hydra, the cause to us of so many calamities. Let us not scotch the snake but kill it.

To this policy, however, although justifiable by the laws of war, there are objections. It would be difficult, if not impossible, of execution, except by means of an armed force throughout the South. A mere military proclamation of liberty to the negroes the Southern people would, of course, disregard, and it could have no effect after peace, unless, indeed, its

moral effect on the slaves should destroy slavery, or unless its destruction should be made one of the conditions of peace. As a war measure it would, perhaps, lead to the horrors of a servile revolt, a design not to be imputed to the advocates of the measure, but could have no other effect to weaken the enemy than the course already pursued by the President, of receiving and employing negroes wherever our armies move. As a peace measure, could it be executed, it would break up the fabric of Southern society, change suddenly habits long formed, deprive the negroes, without previous preparation, of the protecting care which, with all its evils, slavery does afford, deluge the South with a flood of ignorant, idle, thriftless pauperism, obliterate a vast amount of property, and involve in indiscriminate ruin Union men and rebels, the deluded victims of treason and traitors, the innocent and the guilty. To the negroes such a step might prove a calamity. Sudden emancipation, under any circumstances, is far from desirable for them, but sudden emancipation, as a hostile act, by enemies in arms against their masters, thus making the freedom of the negro the badge of his master's subjugation, would convert that master into a foe. Neither the two races, nor North and South, could live very harmoniously together after such a proceeding. We do not need it, because we are strong enough to conquer the rebellion without its aid. It would, moreover, be a breach of faith to the Union men in the South. The Government has proclaimed that it makes war only against the rebellion, and has promised to the people protection in all their rights and their former position in the Union.*

Another party, possessing much influence, defeated but not overcome, anxious to regain lost power, and eagerly watching for that purpose the course of events and the tides of opinion, goes to the other extreme. According to this party, the rebellion was a mistake on the part of the Southern people, into

* This was written in May. On the 22d of the following September the Proclamation of the President was issued, declaring freedom to all slaves in States in rebellion on the 1st of January. This Proclamation is of a different character from the measure supposed in the text. See Appendix.

which they were driven by the unjust invasion of their rights. They were entitled to the territories; they were entitled to the rigid execution of the fugitive slave law, so revolting in its details and so insulting to Northern sentiment. Foreign conquest, too, of the fertile regions around the Gulf of Mexico, if it increased the area of slavery, would increase also the national power, and is, therefore, a wise policy for the National Government. The odious character of slavery, and the evils to be entailed on distant generations by spreading the negro race over vast regions that might be secured to a higher civilization, this party wholly disregards. The implied sanction and approbation which would thus be given to slavery and to the principle that men can be property, it also disregards. Slaves and cotton, in its view, are alike property, and form a large portion of the wealth of the country, and as such should be protected and fostered by the Government. They form the whole wealth of the South; and when the Southern people saw them endangered by the election of a Republican President, they were justly alarmed and indignant, and if, in making war upon the Government for the purpose of destroying the nation, they were guilty of excess, it was folly, imprudence and error, rather than crime, for which they may well be forgiven by us, their countrymen and brothers.

Those who reason thus are a portion of the Democratic party, the ancient and trusty allies of the South. When the war broke out they gave to their old friends the influence of their entire sympathy and of such public opinion as they could create in the North, to favor the cause of the rebellion. They placed also in the difficult path of the Government whatever obstructions they could, short of open physical resistance. They poured forth argument, ridicule and vituperation upon all the men and measures of the administration; they magnified Southern victories and Northern reverses; they disparaged our generals, our army, our successes, and constantly predicted failure and disaster even in the midst of our triumphs. They advocated the cause of secession and denounced the war as a mere Abolition war, and a wicked attempt to

subjugate a brave people fighting for their homes and their rights.

These discordant voices, however, were soon lost in the grand symphony of patriotism, which swelled from all classes and all parties of the Northern people. The masses of the Democrats were caught by this music, and marched to its inspiring strains in the armies of the Union. The uprising of the people, caused by the fall of Sumter, dissipated the hope that to avoid war, concessions and compromises would be offered by the Government to rebels in arms against its authority. It was evident that a Northern party to oppose coercion, either by force or opinion, could not be formed. After an anxious period of suspense, events soon proved that the North, united in purpose and feeling, must be victorious in the end. The rebels could not take Washington, could not invade the Northern States, could not therefore dictate terms to the conquered Government, and with the aid of the Democratic party, reconstruct the Union on its old basis of Southern supremacy. Nevertheless this object has not been abandoned. As the progress of the war encourages hopes of reunion, the terms on which it can be effected demand attention. The Southern States must always be a powerful ally, and slavery an element of strength in political contests. The Democratic party, to whom they belonged before, is determined if possible to secure them again. And how? By yielding as before to all their demands. The movement has commenced. The leaders have sat in solemn conclave, a platform has been prepared and a cry invented, rather a taking one it must be confessed: "The Union as it was, and the Constitution as it is."

The popular sentiment having been pronounced so decidedly in favor of war for the Union, we are told at length by these tacticians that the Union is indispensable to the prosperity of the nation. This had been said before, but it has been coupled now with a doctrine referred to in the second chapter. If any of the States succeed in establishing their independence, the legal tie which connects the others would be by that act sundered, and all be brought back to the condition in which they were before the Constitution was made. Of course then, this

indispensable Union will cease to be in their eyes even desirable. Reason and thought, and the habit of consultation and combination, so peculiarly the results of American education, would at once lose all influence over the States or the people. The strong would immediately begin to prey on the weak, and the result would be war raging throughout the land, until after many years of confusion and misery, this once happy Republic would be divided, as Europe is, into separate nations, each watching the other with jealous eyes, each armed, and each therefore an absolute monarchy. To avoid such a destiny, the one thing necessary is Union. But how can the Union be restored? Not surely by war. It is impossible to conquer the Southern *people*. They are brave and high-spirited. They have a vast territory. They have great resources in their fertile soil and the labor of their slaves. You may defeat their armies, occupy their sea-ports, even overrun the interior spaces of their country, but a people determined on resistance can never be permanently subjugated, and the Southern people will resist to the last extremity rather than submit to the rule of the *Black Republicans*.

Since war then cannot save us from the disasters of disunion, what can? Conciliation. But it might be said, what offers of conciliation can the Government make that it has not already made? Has it not been proclaimed in every possible official form, that this war is waged not against the people, but against the rebellion? Do not our generals, wherever they go, declare their purpose is not to destroy, but to protect? Do not they promise safety and security to all rights, and to every man, not in arms against the Government? Do they not invite the people back to the old flag, and to all the blessings they enjoyed under it? "Ah!" say the Democratic leaders, "that is not enough. The Southern people know their friends. They will not accept conciliation from Abolitionists, but they would accept it from us." "And what terms would you offer? Surely you would not propose that the Government should so far forget its dignity and authority as to sue for peace, seek negotiations and make concessions to rebels with arms in their hands! What is your plan?" "We will tell you," is the

reply, "when we sweep the country at the next election. Let the Confederate States hold out till then, and the Democratic party will save the nation and restore 'the Union as it was, and the Constitution as it is,' for we only have the power." It is obvious enough, that the Union here meant is the Union between the South and the Democratic party, and the Constitution to be preserved is one that covers all the extravagant claims of the South in favor of slavery, which claims caused the war.

There is hope that these extreme opinions and schemes will not prevail. The Northern people are intelligent and moral. Nowhere on earth is education so generally diffused, nowhere else is the ability to think and act on public affairs so universal. Their minds are now thoroughly roused, their best emotions excited by the great events of the hour and the great interests at stake. They are willing to forget the divisions of party, even the just resentment caused by rebellion and treason. In the midst of war, the Northern people are as yet full of kind feelings to the South, and ready at any moment to forgive the past. In the noble display of sentiment and mental power they have made and are making, in this their day of trial and danger, they have done more to vindicate the cause of free government than by all their previous prosperity. They have determined to save their country and to keep it, if they can, unmutilated and unbroken for themselves and their posterity forever. They cannot be led by fanaticism to oppress and outrage one portion of it, or by party spirit or party management, however adroit, to succumb to the arrogant dictation of that portion. They are anxious that slavery be so managed as to do justice to the South, and at the same time satisfy the moral sentiment of the Northern people, and any plan adopted by the Government which may combine both these conditions will be sanctioned by the practical good sense of the country.

Our Government is now placed in a position similar to that occupied by the Convention that made the Constitution. The task of the latter was to strengthen and consolidate a Union; that of the former is to restore one, and how to deal with slavery was and is the Sphinx's riddle, presented to each, to

be solved on pain of death. The Convention solved it by giving their sanction both to slavery and the slave trade. They disapproved of both, and they accepted both wholly as a necessity. But they did not say so in the Constitution, and that, not their debates, has been, and must be, regarded by posterity as the expression of their opinion. Neither did they understand the nature of the negro. For want, therefore, of candor and of knowledge they failed to read the riddle aright, and as a consequence, the teeth and claws of the inexorable Sphinx have been rending and lacerating their work ever since, and at length the vengeful monster has torn it to pieces. We now go forward to its rescue. "Read me my riddle, then," the Sphinx cries to us, "and read it aright, or I will destroy you utterly." We must try to obey. It is our fate. Four millions of negroes in their African fashion, with mute eloquence and humble uncouth bendings, are speaking to us, all unconsciously, words of command. "Find out our true position," they say. "We cannot find it out for ourselves. We knew what it was in Africa well enough. We were put there by our Creator and he taught us. But you brought us here and placed us in the midst of your incomprehensible civilization and alongside of your people who are to us as gods. We cannot reach up to the one or keep pace with the other. But this much we do know: we are entitled to the eternal and universal justice, which is born of heaven and will live when earth has passed away. You are wise. Place us where we ought to be, or we will conquer you by our degradation, rivet our chains around your necks, and overwhelm you by our dusky multitudes."

This is the problem offered to us by the war. Let us approach it in the spirit of truth and with the advantages of experience. The subject has three essential elements: the needs of the negro, of the Southern people and of the Northern people. Any plan that does not satisfy all of these must fail.

It rightfully belongs to us to determine the position of the negro, not to him. Our race is permanently different from his, and permanently superior in all mental, moral and physi-

cal qualities. We must therefore govern him, because it is the attribute of superior power to govern. From the earliest antiquity his intellectual force and capacity have never varied, and he has always been governed by the white race wherever he has been its companion. We cannot even consult him about the position he ought to occupy in our social system. It would be absurd to do so, for he could give no intelligible answer. Therefore, he never has been consulted. The Abolitionists themselves are now debating the question, what shall we do with the negro? Shall we set him free? Shall we keep him in slavery? Shall we send him back to Africa or to some island in a Southern sea and so get rid of him and slavery together? No one ever thinks of discussing these questions with the negro, who is the party most deeply interested. It would be ridiculous to submit them to him and to put a ballot-box into his hands that he might decide them. No opinion of his would influence ours in the slightest degree. He has never expressed an opinion because he cannot have any. He is passive because the whole subject is beyond his range of thought. Not at his instance has the slavery question been mooted and agitated. He has never asked for liberty. It is doubtful whether, when well treated, he even really desires it with the rational desire of one who can appreciate its advantages, enjoyments, duties and responsibilities. A child likes freedom and is glad when the hour comes for release from school. Ignorant and foolish people like freedom from all restraint and the privilege of doing as they please. But freedom in any manly and proper sense, freedom coupled with toil, care and moral obligation, the great mass of the Southern negroes do not desire, because they cannot comprehend it. Nevertheless, some of them can comprehend it, and the race, though incapable of civilization, in our sense of the word, of advancing with us in industry, knowledge and the arts, is able, under our guidance, to reach the rank of a free working class and enjoy its privileges. This ability cannot be conferred upon the negro by law, though restraints upon it may be removed by law. It must be the result of circumstances and education.

If we have thus by natural law the right to govern the negro, the same law imposes on us the duty to govern him for his own good, not exclusively for ours. Four millions of negroes represent a vast sum of human happiness or misery which we have the power to influence. We are bound to exercise that power with justice and humanity, under penalties. There is no such thing as power disunited from duty. If I have control of another, I am responsible for his well being. This is the universal law of justice, and if we reject that stone from our edifice it cannot stand.*

The question then is, what is the best and happiest position for the negro, living, as he does, alongside of the white race in the Southern States, constituting, as he does in some of them, one-half or more of the population? As he is, by the laws of nature, inferior to the Saxon, no human laws can make him equal. The principles of democracy do not apply to the negro. He is not capable of thinking at all on the political questions or the great interests of a civilized community, and therefore he is incapable of acting. Evidently the ballot-box is not an instrument that he can use with benefit to himself and others. It is useless, however, to discuss the question of granting political power to the negro in the South, as no party of any influence in the country advocates so wild a scheme.

If he is not fitted for the highest place in the social scale, is the lowest,—that of a chattel slave,—one in which his faculties will find their most healthy development, and his capacity for enjoyment be most fully satisfied? Is he not a human being? Has he not spiritual life in him? Has he not affections which demand their objects, a mind capable of improvement, moral sentiment that may be cultivated, purified, and elevated? Can he not, in his humble way, be made to appreciate Divine truth,—be taught that even he is an object of God's infinite care, justice, and love; and that for him, too, however lowly

* On this point I refer with pleasure to an eloquent and philosophical little book, entitled "The Rejected Stone, or Insurrection against a Resurrection."

here, dawn the hopes of a life hereafter? If this be true, then he is a man and not a thing,—a piece of our common humanity and not a piece of merchandise; and to class him among things and to treat him as merchandise is to place him in a false position, where, however well he may be fed and clothed, the needs of his moral and intellectual nature cannot be satisfied. As man the negro has rights, as property he has none,—no right to the proceeds of his toil, to wife or child, to choice of occupation or abode,—no right of self-defence, no right to himself. As property he has no claim on the justice or humanity of his master, and exists only as an instrument of gain. The principle that a slave is property binds fetters on his soul, shuts out the heavenly lights, and bars against him the path of moral and mental improvement.

If the negro's nature be too low for equality with the white race, and for the enjoyment of political liberty or power over the State, it is too high, seeing that he is human, for the condition of a chattel. What, then, is his proper position in the social scale? His bodily strength and mental weakness fit him to be a laborer in those pursuits which require bodily rather than mental force. He cannot think, but he can work. He cannot become a skilful artisan or build ships and cities, or make or use machinery, or conduct commerce, or write books, or make laws, but he can dig and plough,—can be a hewer of wood and a drawer of water. He is thriftless, improvident and indolent by nature, because frugality, forethought and industry were not needed in Africa, where the soil and climate supplied his wants and provided for his future. Therefore here he requires guidance and control,—some rightful superior to govern him for his own good. That natural government he finds in the white man, and his true position is that of a peasant,—of a "*person* bound to service or labor," for such terms and on such conditions as the law may prescribe.

Such laws ought to recognize the real qualities of the negro, one of which is his capacity for improvement, and to regulate the terms and conditions of his servitude according to his progress, thus opening the way to his enjoyment of entire freedom. They ought also to recognize the grades of race, and

the fact that a mixture of blood creates differences of intellect and character, of sensibility and aspiration, which justly demand a wider scope for development and a different social rank from those accorded to the negro of the whole blood. It is monstrous that at this moment, in the South, many thousands of mulattoes and quadroons are held as slaves and treated as property. The laws of race are thus violated, and the transgression, as in other cases, has brought its appropriate punishment.

Now, what is the place assigned to the negro by the Constitution? It does not call him a citizen, nor rank him among the people. The words "we the people," with which the instrument begins, do not apply to him. He did not vote for the Convention, he was not consulted in any way about the Constitution, nor did he help to ratify it. Neither does the Constitution call him a chattel, but uses words which exclude the idea that he can be property, and which, if not expressly meant to exclude that idea, were intended to open his way to a higher position. It does not even call him a slave,—the meaning of which term is, a person subjected for life to the will of another. It describes the negro as a "person held to service or labor." How held? By the law, of course, and for a longer or shorter time, and with more or less power in the hands of the "party to whom such service or labor may be due," as the law, in its wisdom, may direct. The Constitution thus, while it does not expressly condemn or prohibit even chattel slavery,—for how could it, and in the same breath permit the continuance of the slave trade,—yet recognizes and anticipates a rank for the negro race which suits its nature, and may, for that reason, be regarded as its best possible or ideal state. It permits slavery, but throws wide open the door to its amelioration and gradual extinction in the States where it existed, according to the will, not of the black, but of the white race in those States.

This brings us to the consideration of the second element mentioned above, as essential to any plan for the settlement of the difficult subject of slavery at the present time.

The masses of the negro race are in the South. They are

four millions strong, and rapidly increasing. In the Cotton States they almost equal, in many regions they greatly outnumber the whites. They may be called property, but they prove their claim to humanity by the influence they exert on the white race. They are a lower type of man than the Saxon, therefore they cannot govern him. They cannot approach his level of civilization or have mental communion with him, but must remain forever, under the best circumstances, essentially alien, because permanently inferior. They form indeed a vast body of African life, introduced into the midst of our high and progressive Anglo-American life, its inseparable companion forever. Look at it, for it is a portentous fact. Africa, transplanted to our Southern soil, striking root into it with tropical vigor, sending forth in all directions, like the banyan, branches, which, as they droop to the ground themselves take root, spreading thus the dark canopy of the tree, till it threatens to usurp and overshadow the land. This is the condition of the South. The negro race there is dangerous to the Saxon, because of its numbers, its inherent degradation, its incapacity for civilization. It threatens him with servile war, with the pestilence of an ever increasing mass of ignorance, vice, pauperism, and barbarism. It must be governed by somebody, for it cannot govern the Saxon or itself. To save the South from becoming African, Africa in the South must be regulated and restrained by some power external to itself. Now, in whose hands ought that power to be placed? In those of the Northern people, who are safe from the danger and ignorant of its nature, and therefore ignorant of the means to avert it, and without the motive of self-preservation to find a remedy or to use one? Is it not too plain for argument that power to govern the negro of right belongs to the Southern people, who must face the perils of his presence and growth, who must bear the burden of his weakness, and who understand his character?

Out of these qualities of the negro has grown up the whole structure of Southern society, and the manners of the people. The negro is a laborer, and thus his relation to the white race is a controlling element in Southern industry. He is a domestic servant; his position therefore influences the most pri-

vate and sacred concerns of the family and fireside. The labor of the negro is the source and support of Southern prosperity. He brings out of the soil cotton, tobacco, corn, rice, sugar, and these constitute the wealth of the Southern people. The position held therefore by the negro race is connected in the relation of cause and effect with the safety, the social arrangements, the domestic habits and the prosperity of the South, with all its interests and with all its hopes. Who then should govern the negro, the North or the South? This question has been decided wisely and well by the Constitution.

But slavery is not sectional, it is national; national in its benefits and evils, in the political power that it possesses, in the political power that it invokes for its protection. It may elect a President; its vote may control the action of Congress; its productions have enriched the nation, and its treason has, for a time, at least, destroyed the Union. Northern men have therefore a deep interest in slavery. They have also much power over its destiny. Any plan, therefore, to arrange the slavery question, must satisfy the requirements of the North.

The North requires the Union. A separate nation established in the South, by its conflicting interests and its foreign alliances, would endanger the safety and repose of the Northern people. The North requires the whole country in its length and breadth. It will not yield, if it can keep, the Mississippi River and its outlet, the Gulf Coast and the cotton crop. It needs all these as the basis and support of its great Northwestern interior trade, its foreign commerce and its manufactures. The North requires the Southern people, its brethren of the Saxon race, for contented fellow-countrymen. It needs their prosperity and advancement in all good and worthy things, because it needs their power, their wealth, their intelligence and valor to help build up in this Western World, a great empire of civilization, to surpass the marvels of the East. But the North has other than these material wants. It has reached a point of moral culture that must not be revolted or contradicted by the Government. The Northern people do not approve of slavery, and no power on earth can make them approve it. They laugh to scorn, laws and Supreme Court de-

crees which declare that men can be property. Even the human relation of master and slave, however justified by circumstances, they know to be fraught with danger to all that is good and noble and beautiful in character and manners.

This relation, therefore, is an evil thing, and is one of the evils caused by the presence of the negro race in large numbers at the South. Against the spread of that race over the territories under the jurisdiction of this Government, the North has set its face like flint. The Government is the trustee for the people of those magnificent tracts, the seat of future civilization; and not by the aid of Northern votes shall they and their posterity be cursed by Africa and slavery. Both of these are the fate of the Southern States. The Government could not, if it had the legal authority and the desire, take the negro out of those States. The black race is established there, in some of them, forever; in others for an uncertain period. The people of those States have, by moral right, as they have by law, the power to govern the negro by their own lights and according to their own views of safety and interest. With the exercise of this power the Northern people have no wish to interfere, but they insist that their settled convictions on the subject shall be now expressed, and their moral sentiment satisfied by the Government.

This is an historical period, decisive of the fate of the nation. We are in the midst of a great war. Fundamental principles are examined and discussed. We are perhaps on the eve of great changes. Instructed by the past, let us try to provide for the future. Let us settle this vexed slavery question, and that we may place it on firm foundations, let Congress do what the Constitutional Convention failed to do,—tell the truth. The difficulty has been to find out some comprehensive plan that may contain that justice which at last satisfies all men. To this object discussion and controversy have been long tending, each party pressing its own interests and views. In the Federal and State Legislatures, in lectures and speeches of every kind, in the current literature and in all journalism, the rights of the North, the rights of the South, and the rights of the negro have each found zealous, and in many cases, most

able advocates. But various obstacles have always started up in any path that promised to lead out of the wilderness,—sectional interests, State rights, legal questions. Yet out of this wilderness we must go or be lost.

At length the pathfinder, as we thought, had appeared in Mr. Lincoln. The road to which he points seems so obvious and easy, that the wonder is no one ever noticed it before. The discovery is announced by his Message of March 6th, in a few simple sentences according to his custom. "The United States ought to co-operate with any State, which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State, in its discretion, to compensate for inconveniencies, public or private, produced by such a change of system." These words are full of meaning. If they do not cover the whole ground, they go as far as the Constitution permits.

To the negro they offer hope, the assurance of sympathy, and the promise of aid in his favor, so far as the Government has power to interfere. To the Southern people they declare respect for State rights, and concede to them full power over the negro race. At the same time the Message says to the South in all candor: "Slavery is not itself a good thing; at best it is a necessary evil. When you are convinced that it is so, and wish to get rid of it, ask the Government for help and you shall have help. You see now how foolish you have been. We always told you we did not intend to attack slavery, but to defend it. You would not believe us, but believed the Abolitionists. This Government has been and is the only defence of slavery. Even during the war it has protected it, and it offers now to do so notwithstanding the war."

The Message offers also satisfaction to the Northern sentiment against slavery. It pledges both the legal action and the moral influence of the Government, not only against its extension, but for its extinction, by a safe and gradual process that shall do justice to vested rights, and avoid the mischiefs of sudden change. The Message, therefore, puts the nation in its true position before the tribunal of the world's opinion. It tells the truth, which the Constitution failed to do, and pro-

claims to the age, that this Government tolerates slavery, but does not approve it; prohibits where it can, and maintains it only where it must; that slavery is not an American but an African institution, and is here only because Africa is here.

In accordance with the suggestion made by Mr. Lincoln, Congress has already passed a bill offering pecuniary aid to the States that may desire to get rid of slavery. They have also abolished slavery, with compensation to masters, in the District of Columbia, and an Act has just passed the House of Representatives (May 13th), prohibiting slavery forever in the Territories. These measures are all within the power of the Government. To go further would transcend the Constitution. For the existence and condition of slavery in the country, therefore, this Government is no longer responsible. These measures are wise and just because they express the enlightened convictions of the Northern people, who as the great majority of the nation, have a right to demand that their sentiments shall be represented by the Government. They also accord with the spirit of the age, which cannot be disregarded without loss of national reputation and position.

All these acts, however, though so just and moderate, were opposed by most of the members from the border Slave States, and by Northern Democrats. Does this opposition proceed from sectional pride, or a desire to maintain slavery as an element of party power, or from an honest conviction that slavery is a blessing, and ought to be cherished and extended? Whatever the cause, the fact of opposition, especially of Northern opposition, to such measures is ominous of future difficulty. It creates a doubt whether, when our fathers endeavored to unite slavery and liberty under the same Constitution, they did not attempt what is in the nature of things impossible. Are the Abolitionists right then when they declare that the Northern people have no choice on this subject, the eternal truth having said to them: "Either destroy slavery now, or permit slavery to destroy the Union. You can have no fellowship with an evil and wrong thing. Whether slavery be in the Union or out of it, you can never live in peace with it as your close neighbor. Between slavery and liberty, between

negro barbarism and Saxon civilization, there is and must be eternal war, an 'irrepressible conflict' that will never cease but with the absolute triumph of one or the other. Better settle this conflict now if you can." Perhaps after all this is what the Sphinx means. Truly may it be said that Africa has invaded and conquered our country, and though we may call the negro a slave, he is the master of our destiny.

The President's proposal went as far as the Constitution permits. It was addressed to the Border States, from which slavery must be banished, sooner or later, by the operation of natural causes. It was intended to reassure them as to the intentions of the Government, and thus to confirm their wavering loyalty, secure their adhesion to the Union, and deprive the leaders of the rebellion of all hope of gaining those States to their cause. As a practical measure it can have no effect, in the manner proposed, upon slavery in the Cotton States, which are the seat of its empire; not only because they would reject it with scorn, but because compensation is out of the question, so large is the value of the negroes.

But the moral influence of this Message is of great importance. It does what the framers of the Constitution failed to do,—it tells the truth. It does what no administration has dared to do since the Constitution was made. It proclaims that chattel slavery is an evil thing which ought to be got rid of. The act of Congress, which followed the message, proclaims that, for the sake of getting rid of it, the Government and the American people are willing to pay large sums of money, as England did, to accomplish the same object. It says, "We would abolish slavery if we could, and we would do it with just consideration for the interests connected with it. The only reasons why we do not abolish it are, first, those interests are too vast for the national treasury to purchase; and, secondly, we have not the constitutional power. All that we could do, we have done."

This is a great step onward. Compare it with the humble beginnings of the Abolition enthusiasts, with the Missouri Compromise, with the last atrocious fugitive slave law, with the Lecompton Constitution, with the Dred Scott decision, and the progress of opinion is obvious. Moreover, it is an irrevocable step; no backward one can be taken. The tide of opinion which has floated the nation to this high-water mark, knows no ebb. It flows from perennial fountains seated deep in the heart of humanity, in the moral sentiment of the world; fountains unsealed at Calvary and on the Mount. The message may fail as to any immediate practical result; the act of Congress may never be carried into effect, and probably will not; neverthless they are records which announce the fact, that the Northern people of this country, after seventy years' experience, have condemned slavery as it exists in the South, even though they permit it to exist. Had the framers of the Constitution done this as emphatically, what mischief they would have prevented.

It may be doubted, however, whether the Message reaches the root of the evil, for it cannot be executed throughout the South. Our fathers did not venture to make the Constitution express their disapprobation of slavery. They did not, like Mr. Lincoln, declare that slavery is an evil thing. They did not say, we permit it for a time, only because we are forced to do so by inexorable necessity, and because we hope it will ere long disappear. They refused, indeed, to use any words in the Constitution which implied that there could be property in men. Nevertheless, they permitted the slave trade, based upon the idea of such property; and they provided for the return of fugitive slaves, treated at the time as property by the laws and practice of the South. Whatever the language they employed, therefore, impliedly they did recognize men as property. The most that can be said of this part of their work is, that they could not bring themselves to say, in plain terms, what they were obliged to do; that they refused to blot the Constitution with the open avowal of what they felt to be false; that they thought they cleared themselves of responsibility by leaving the matter exclusively to the States;

and that they used phrases which are applicable to a different position of the negro, if the States should choose to give him a different position. He might be "a person held to service or labor," and yet not property. The States interested have not chosen to give him a different position. It is impossible to say that they have not, for this determination, the sanction of the Constitution.

But slavery has been found inconsistent with the Union. It is not enough that it suits the South; Northern opinion must be satisfied also. Let us inquire why slavery is inconsistent with the Union. Perhaps thus some basis may be discovered on which a Union may be founded.

It is not true that there can be property in men. The eternal laws of nature which govern both men and property, contradict such a dogma; and no Constitution, by asserting it, however expressly, can make it true, any more than it can make it true that two and two are fifty, or that the three angles of a triangle are a circle. Let any one attempt to keep books by the first of these rules, or to build houses by the second, and he will fail. In like manner a Constitution that attempts "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty," by means of a government founded on a falsehood, will fail; more especially if that falsehood be moral,—be the denial of principles to which obedience is duty.

The moral laws punish transgressors. An untruth, a lie, will work after its kind in spite of wise conventions. A lie poisons all human relations. It inflames and festers whatever surrounds it, like a thorn; and the only remedy is to pull it out. Put an untruth into a constitution, more especially a moral untruth, and so long as it remains there it will bear its natural fruits, which are not peace and order, but confusion and strife.

The laws of God declare that man is not property; that things, not men, are property. The Constitution says that men may be made property by the laws of a State. This untruth has been the cause of all our troubles. It has been

inflaming and festering our body politic from the beginning, throwing it from time to time into hot fevers and convulsive paroxysms; at length it has burst into a sore, running blood.

Let us look for a moment at the natural consequences of this doctrine. Because it was false it was sure to be attacked. That is the fate of all falsehood in an enlightened age, and in a country where freedom of speech and of the press prevail, or even where they do not,

"For stony limits cannot keep love out,"—

love of beauty, or love of truth. Neither can laws, or guards, or police, be they never so perfect, keep thought out, or prevent its free range. It has ways of its own to accomplish its purposes. It can drive a coach-and-six through a statute, glide through the ranks of armies, and stand an invisible but commanding presence by the side of an oppressor's throne. It can visit the plantation hut of the negro. The birds of the air will carry it wherever a truth is made captive, wherever a falsehood lives; and sooner or later, the truth will be liberated and the falsehood die,—though the deliverer brings often not peace but a sword.

The idea that men can be property was, therefore, sure to be attacked. It was as sure to be defended, wherever men were treated as property, and because they were so treated. Property will always be defended by its owners; and so will power.

"Plate sin with gold,
And the strong lance of justice hurtless breaks:
Arm it in rags, a pigmy's straw doth pierce it."

So it has always been. Truth has won her great victories, not by the sword of the spirit only. Connect wealth and power with a falsehood and they will fight for it. Make the slaves valueless and the Southern people will readily acknowledge that they are not property. Make them worth two thousand millions of dollars, and an army with banners will arise to declare, by defiant volleys, that property they are and shall be. So it has happened with us. The owners of this property scented danger from afar and prepared for it. So long as they could control the Government they were willing

to live under it and use it. As soon as they ceased to control it, they answered the ballot-box by bayonets.

The falsehood that men can be property, therefore, after giving many warnings of its dangerous nature, has at length caused this war. It will cause war so long as it remains in the practice of the South, because it will always be assailed by enlightened opinion. Nothing can prevent this but the forcible suppression of all organs of that opinion, meetings of the people, free speech, a free press and the ballot-box. This has long been done in the South so far as slavery is concerned. Slavery and freedom are eternal foes and cannot live together. But it cannot be done in the North. Is it not true, then, that a Union between North and South, on the basis that men are property, is impossible?

The Constitution does not say that men are property, but it does not say they are not. It leaves that question to be decided by the local authority of the States. It is one of their reserved powers. Whatever they decide, the central Government stands ready to execute, so far as its action may be necessary. As the Northern States are represented in the central Government, they are thus required to be not merely passive spectators of what the South may do, but actively to participate in what they do.

Of this the clause in the Constitution relating to fugitive slaves is an example. Why was that clause introduced? Is it not because it is false that men are property, and therefore some constitutional provision was necessary to protect it? The ordinary legal remedies are sufficient for every other sort of property. The Constitution says nothing about horses and cattle escaping from the South. But because by the laws of nature men are not property, the organic law and the central power of the nation were thought necessary to enforce the dogma that they are. And why have the laws passed to carry out this clause of the Constitution failed of execution, been obeyed with reluctance, been obstructed, in some cases resisted? Is it not because men prefer the laws of nature to the law of the Constitution? Because they are revolted at being required to lie, to say, or to act as if they admitted that

men are property, when they feel that it is false? It is impossible to execute such a law without dissatisfaction and resistance in any moral or enlightened community. That it has been partially executed in the North, that it has not been universally rejected and spurned, is proof of the love of the people for the Union. They have done what the framers of the Constitution did. For the sake of the Union they have been willing to acquiesce in a lie. They have endeavored, also, to shift the responsibility on the General Government, as the Convention did on the States. "Thou canst not say I did it. The Government does it, and by its own officers." Had the Southern States by their laws and their practice made slavery the relation of a man to a man, not of a man to a thing; had they rendered the mercenary element subordinate to the human; had they given to the slave rights which opened to him the path to freedom, in cases where he is fitted for freedom, there would have been no opposition to the fugitive slave law. To restore a servant to his master is one thing. To restore a man, as a chattel, to his owner, is a very different thing.

It seems, therefore, that when the Constitution gave to the Southern States the exclusive right to govern the negro, they attempted what was impossible, unless those States choose to govern him as a man and not as a thing, by Divine law instead of slave-traders' law. If they will do that, Union and the Constitution would become possible. Because they have not done it, the Union has been broken and the Constitution cannot be executed.

Why is it that this humble, despised race has such fatal power, not over the South only, where it dwells, but over the whole nation, power to involve us in the calamities of civil war, to impose on us and on posterity the heavy burden of taxation and debt; power, perhaps, to break our proud empire into fragments? Is it not because the eternal truth is its champion? Is it not because, being humble, we have dared to despise it, though created by the same God that created us? The interests, the rights, the well-being of the negro have been left out of our selfish contests as unworthy our re-

gard. We have looked calmly on and seen him used exclusively as an instrument of gain, bred for sale and driven like sheep and cattle to the market. It is unconstitutional to interfere, we said, and cotton is a good thing. But we have been forced to interfere or become slaves ourselves. The negro has thus obliged us to care for him in order to save ourselves. "We will make your country not worth living in," he says to us, "unless you make it worth our living in. We have neither wealth nor power, but we create wealth and power that will be your enemies until you do us justice. We cannot vote or fight, but we can make men of your own race vote or fight to your destruction, unless you grant us our rights. Give us our proper place in the social system of which we form a part, or with your own people who live with us in the South, you shall have perpetual war or become their base instruments for our degradation."

What is that proper place? The Southern people must find it out. It is not that of a chattel, because a negro is a man. Some position as a man is his due. He cannot be equal, he must always be inferior to the Saxon. Nature has created that difference. He must be a servant. Then make him a servant. His services are valuable. His master has a property in them, but not in him. Then say so, and found your system on that principle. Give him the rights of a servant; do not deprive him of all rights as a man. Treat a man according to his just relations, either as a superior, an equal or an inferior, and harmony is the result. Violate those relations and the eternal law vindicates itself by the disorder and strife that ensue.

Take from slavery the element of property,—even subordinate that element to its true rank, and slavery will be disarmed of its terrible power over the country. The negro must still be governed by the white race, and, as he becomes concentrated in the extreme South, must continue to subject its people to the injurious influences of an inferior race; but when he ceased to be property, he would no longer play a part in the politics of the nation. Obey the truth. Give him the position for which he is fitted by nature, and he would be no

longer dangerous. There would have been no Abolition party in the North, had not the negro been made property by Southern laws. The Southern people would not have made war about him, had he not been property.

But what can we do? The President's scheme of conditional, compensated, gradual, contingent emancipation, cannot be executed. Even should the South accept it, the property element rises up and forbids its execution. Cotton has swelled the property in man, permitted by the Constitution, into such gigantic size, that the country, rich as it is, is not rich enough to buy it. Shall we, for the sake of the Union, abolish slavery by the exertion of the supreme, imperial power of the Government, which, as argued in the first two chapters of this volume, is paramount to the Constitution? This plan would also be impossible, for two reasons. First, because, should the result of the war be the restoration of the Southern States to the Union, they would never consent to it, and could defeat it by their own and Northern votes. Secondly, because emancipation, without compensation to the master, would be unjust. We cannot remedy one wrong by committing another; we cannot permit property to be acquired under the law, and then take it away by law.

Shall we, then, should victory give us the power, restore the "Union as it was?" Do the Northern people really desire to see it restored,—the old "tar and feather Union," under which no Northern man could visit the South, without risk of insult and outrage, unless he worshipped slavery; under which the Northern people were converted into a police to catch runaway negroes; under which the threat of separation and civil war was constantly brandished over Northern elections; a Union which was so weak that it could be broken by 350,000 slave-owners; a Union with a section that was exclusively sectional and aggressive in all its feelings and aims; a Union with receding civilization and advancing barbarism; a Union based upon a falsehood; a Union with an element in it of perpetual agitation, strife and war; in short, a Union with chattel slavery,—do we wish to restore such a Union? Fortunately for us, it cannot be restored. It had long ceased

to be a Union of affection and sympathy. This truth has at length become manifest in fact. "The Union as it was" has gone forever. Separation, with all its dangers, is to be preferred to such a Union, with all the wealth and power that it brought. "Better is a dinner of herbs where love is, than a stalled ox and hatred therewith." "Better is a handful with quietness than both hands full with travail and vexation of spirit."

As already stated, the essential conditions of any plan by which slavery can be made consistent with the existence of the Union are threefold. First, it must do justice to the negro, and accord to him his rightful position as a man. Secondly, it must respect the rights of the Southern people, which require that the negro race shall be governed by them, and not by the Northern people. Thirdly, it must respect the interests, the moral sentiment, the conscience and opinion of the Northern people, who have a right to be heard on the subject, because they participate in the government of the negro race by means of the central power, and are therefore responsible for his good government.

All these conditions have been violated. The South, by disregarding the rights of the negro, by refusing to regard him as anything better or higher than property, has outraged the sentiment of the Northern people. The result of this was the rise and growth of the Abolition party, who undertook to interfere with the exclusive control of the negro by the South; and resistance to the designs of this party has caused the present war, the object of which is the destruction of the Union, and has, indeed, at least for the time, caused its destruction.

This result was sooner or later inevitable. A falsehood, however bolstered up and hedged round by law, will always, among a civilized and free people, be attacked by the ministers of truth. A falsehood that sustains wealth will always be defended by the owners of that wealth. Thence war. For these reasons the old Union failed. For many years it had ceased to be a real Union, but had become a repressed conflict between truth and falsehood, right and wrong. At length the conflict, as was its nature, became irrepressible, and has broken

the Union, which can never be restored. It was not worth keeping, and is not worth restoring.

Nevertheless, a Union we must have, if possible; if not the Union as it was, the Union as it ought to be,—a Union of all the States under the old Constitution and the old flag. We can never have one, unless we get rid of the falsehood which destroyed the former.

As already shown, we cannot do this by the President's plan of emancipation by the States, with compensation to the owners, furnished by the central Government; we cannot do it by an act of emancipation by the central Government; we cannot do it by emancipation as a war measure, unless, indeed, a very large portion of the slaves could be thus set free, and such a spirit of insubordination spread among the negroes as to render slavery thenceforward impossible.

But does not the history of emancipation in the Northern States suggest a remedy? The Legislatures of Pennsylvania and New York,—the former in 1780, the latter in 1799,—passed acts declaring, that every child born of a slave, after a certain date, should be free. By these laws, all existing rights to property in slaves were respected. The process was gradual. No shock was given to established social relations and habits. Time was afforded to prepare the negroes, as well as their masters, for the change, and the evils that must attend sudden emancipation were thus prevented.

Would not this plan fulfil the conditions above mentioned, as essential to the peaceful and permanent settlement of the question?

It would do justice to the negro. It would convert him from an article of merchandise into a man. It would take out of our law the untruth that men are the subjects of property. Even those who remained slaves would be benefited, whilst they would avoid the risks of being suddenly placed in a position for which they are unfitted by previous habit. Their children would be free. They would gain self-respect by the elevation of their race, and would gain, also, respect from others. Under these circumstances, to the larger portion of them, their servitude would be a protection and a blessing.

The rights of the Southern people would be respected, so far as those rights are consistent with the safety and tranquillity of the nation. Their property in slaves would be untouched. Their right to govern the negro, as a man of an inferior race, would be untouched. The law would say to the South, give him the place of an inferior. He is entitled only to that, but you must not make him property, for by the laws of nature he is not property. It would then be for the Southern States to enact such laws as their own safety and interest required, and ample time would be allowed for deliberation. Their social system would be changed, but it would be slowly changed. They would be benefited. It does not follow that because the negro is not property that he must not work, that he must not be compelled to work. It does not follow that he is, on ceasing to be merchandise, to become entitled to all the rights of a freeman or permitted to become a lazy lazzaroni, a mass of ignorance, pauperism and crime. It does not follow that he should not be a servile class, provided the law secures to him the rights of a man. It would be for the Southern States to arrange that by law. Emancipation has succeeded in the West Indies and in British Guiana. That fact is now beyond dispute. The negroes are contented and industrious. These islands are more prosperous than ever. They are demanding more labor,—free labor of coolies or negroes. They would welcome an emigration of the latter from the South. Their climate does not permit the white man to work, but they have vast tracts of land, producing the most costly articles of the world's commerce. They are now begging for the free, voluntary labor of the dark races to develop the resources of their country. Give us coolies and negroes, they say, working for wages, well paid and well treated, and we will grow boundless cotton, coffee, sugar, and tobacco. They had slavery once, but were forced to give it up. They are now satisfied with free labor and would not return to slavery. Why should not the same thing happen in our Southern States?

They would be benefited in another way by the change.

The evil influences of an inferior race on their civilization would be mitigated. These influences must always be very great, for reasons already mentioned, with or without slavery. The new Africa that has been founded in America will always have some of the characteristics of Africa. It is impossible to introduce a barbarous population without introducing barbarism. Africa in America is a fact, irremovable by any force at our command. The only course is to accept the inevitable and find out, if we can, some means to diminish its power.

One way would be to lessen the injurious moral effects, that the presence of a subject race must have upon the governing race. These effects are greatly increased by slavery. The best and wisest men are not fit to be trusted with irresponsible power, would be injured by possessing it. What then must be the effect of granting such power to a whole community, of taking away from a class in it, so large as to come in contact with every individual, all rights and all the guards which the law furnishes against selfishness, passion and lust, even the right of self-defence? What can be the result but a plentiful crop of pride, arrogance, cruelty, and sensuality? How destructive, too, to every noble and humane feeling must be the habit of regarding men and women as property, the daily spectacle of human beings, often intelligent and respectable, often indeed almost white, sold in the market-place, the wife before the eyes of her husband, the child torn from its parent. These things cannot be done with impunity. They degrade those who do them. The wonder is, not that the South has become what it has, but that the noble elements of the Saxon blood have withstood such influences so long, that so much which is good and worthy is left in the South. Take away slavery, and the negro race would be deprived of much of its fatal power over the white. The slave trader, the slave auction, the slave hunt, the whip would disappear. The dangers of servile revolt would also disappear. The negro would at once become at least safe. He is not warlike or revengeful or ambitious. He is contented with an inferior rank, because it is his true rank. The Abolitionists could not, if he had it,

make him dangerous. No "incendiary" lectures, speeches, novels or pictures manufactured at the North, could excite him. He need no longer be guarded and watched. He would accept thankfully his proper place. So it has happened in the West Indies. Millions were spent, before emancipation, to put down insurrection; not a dollar since.

Another way of diminishing the injurious influence of the negro race would be to elevate the character and increase the number of the white laboring classes. This can only be done by furnishing them employment. They can have no employment without a demand for their labor. Why do "mean whites" and "poor white trash" exist and increase in the South? Because they have no work. Therefore, they are poor and ignorant and idle. Give them work and its rewards, give them work that stimulates and exercises the superior faculties of their race, let them taste the sweet bread that is won by honest toil, and they will prefer it to fishing, hunting, begging and stealing; they will prefer decent raiment to rags, and a comfortable house to a filthy hovel. Why does not the white man work? Is it because the negro is, by nature, more intelligent, more industrious, more skilful than the poor Saxon of the South? No, but because the negro is a slave. The stigma thus cast upon labor has its influence, but the monopoly of labor, caused by slavery, has far greater influence. The planter employs his own people, because he must. Out of his fifty, one hundred, or five hundred hands, he has many who are stupid, lazy, stubborn, worthless. He would discharge them if they were free. He has some of his slaves educated to be rude mechanics, carpenters, blacksmiths, wheelwrights, for plantation work. He lives as far as he can "within himself." He employs no white man if he can help it. He looks with disfavor on the growth of a respectable, intelligent, white laboring class,—naturally enough, for it would undermine his power. Destroy slavery, and, like other men of business, he will employ the best labor he can find, the most skilful, the most trustworthy. The intelligence and energy of the Saxon would thus come into free competition with the negro, and

gradually occupy the higher spheres of industry, as they have done in the North.

By this process labor would become respectable, would be rewarded, would aspire, would become skilful and educated. The mechanic arts would be introduced and would flourish. Manufactures would arise and the loom be brought where it belongs, to the side of the cotton crop. The South would not be dependent on Europe or the North for all the comforts and refinements of life, but could have mills, machinery and ships of her own, wherever the climate permits the white man to work. He can work throughout the Border Slave States and in the hill country of the more Southern States. In those regions the poor whites would be redeemed from their degradation and liberated from their slavery. Free and intelligent labor would create capital, capital would demand more labor, which would come from other places, and an industrious and thriving white population would thus be established, to counteract the fatal tendencies and influences of Africa. Africa would be confined to narrower limits, to places where Africans alone can work. Should they become too crowded there, vast tracts of tropical fertility a little further south are ready to welcome them, are at this moment calling them. The civilization of the South may thus be saved, her people may thus hereafter live in an equal and real Union with the North.

It is hardly necessary to say that such a plan would satisfy the moral sentiment of the Northern people. A large majority of them were willing to live under the Union as it was, until the war demonstrated that to be impossible. Very few, even among the most zealous Abolitionists, advocated sudden emancipation. They are the supporters of a principle, the enemies of a falsehood, and their object would be attained. Abolitionism would then have performed its work, and would withdraw from the scene. The only cause that ever endangered the Union would be withdrawn. The two billions would be safe. It is true that prospective billions would be lost to posterity. But contingent prospective billions do not easily raise armies

to fight for them, more especially after the exhaustion of an unsuccessful war.

But how can such a plan be executed? Where is the power to adopt and carry it out? In this, as in other cases already referred to, the weakness of the central Government, according to prevailing opinions, is strikingly manifest. If those opinions be correct, it has no power to save the Union or to save itself. Can Congress abolish slavery in the States? No, say the doctors of the law, not even with the consent of all of them. The thing must be done by each for itself, and by itself, or not at all. Should it be done by the representatives of all in Congress, the act would be void. Nay, it would be void after fifty years of happy union produced by it, and could be set aside, as invalid, by the Legislature of a State, or by a Federal court. Is not the Constitution a finality, unless altered as directed by itself, and is it not to be interpreted by itself alone, without reference to practice or custom, or the consent of the people?

An opportunity for doing this great work may be afforded by the war, a work which once done, would re-establish the Union on firm foundations, and be received with acclamations by the whole people. But such an opportunity may require prompt action, and may not occur again. Fate, as Lord Bacon says, sometimes presents to us the handle of the pitcher, and if we do not seize it, afterwards the sides, which are hard to clasp.

> "There is a tide in the affairs of men,
> Which taken at the flood leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and in miseries."

The object of this war is to vindicate the authority of the Government, and to restore the Union. We expect to do this by victory, by victory over a faction, if the rebellion be supported only by a faction; by victory over the Southern people, if it be supported by the people. We expect to reduce them to submission by occupying their territory, their ports, their cities, their rivers and railroads, by cutting off all the sources of their prosperity. Let us suppose these objects accomplished, and the Southern people tired of the war, unable to resist and

willing to come back into the Union. Might not the Government say, "Slavery has proved itself the enemy of the Union, inconsistent with any safe or peaceful Union. Come back, but on one condition,—that all children of slaves born after the 4th of July next, shall be free." A time may come when such a proposition would be accepted, though afterwards it would be refused. Shall we be told that Congress has no authority to offer terms to a State, to impose conditions on a State; that if the Southern States return at all, they must return with all their constitutional rights?

Let us suppose, as a result of the war, that they do so return and resume their old position in the Union and in Congress. The calamities of the contest, the conviction that it was caused by slavery, that slavery would forever be the fruitful source of strife, if suffered to exist, might induce a majority of Congress, including even some of the Southern States, to accept a measure such as proposed above, if presented at the moment when such influences were fresh, and before the intrigues of party had time to operate. But how could Congress pass such a law? What right have they to control the local interests or institutions of the States? Sovereign power over these is reserved to the States by the Constitution.

It seems, then, that the Government is too weak to save or preserve the Union, though the reserved powers of the States are strong enough to destroy it. I have already endeavored to show the fallacy of such a doctrine, and that it is supported neither by reason nor by the Constitution. Should such golden opportunities occur, it would be the duty of Congress to take advantage of them, and thus restore, not the Union as it was, but one safer and more desirable, because founded on truth and not upon a lie. If they doubt their power, let them assume the responsibility and trust to the people.

Nevertheless, nothing but necessity can justify the exertion of the ultimate sovereignty vested in the Government. It is intended, like the omnipotence of the English Parliament, for extraordinary occasions only. When demanded by a great emergency, when solicited by public opinion, it should be employed. Even then, if the proposed measure involve the fun-

damental principles of the Government, resort should be had, if possible, to the process of amendment authorized by the Fifth Article. Such a course would silence factious opposition, and satisfy honest scruples. It would maintain and cherish a wholesome reverence for the Constitution, and tend to establish it more and more firmly, as time advances, on custom, the only sure basis for law.

Slavery is permitted and protected by the Constitution. It was a mistake, and we must get rid of slavery. The principle of State power over local interests was also established by the Constitution. That was no mistake, but is essential to our system. The Constitution provides a way by which we can get rid of slavery, without affecting the local power of the States. It is not the only way, as I have endeavored to show. It is not an easy way, but on the contrary, intricate and difficult. But, if it can be followed, it is the best way, simply because it is the one expressly pointed out by the Constitution, whilst others are impliedly authorized. Therefore we should follow it if we can.

The dimensions of this war have become vast like our country and its interests. The Southern people have displayed not more courage and ability than were expected, but greater power and resources than were expected. But the power of the North, the force and will, the unity and intelligence of the people, are equal to the occasion. They may be expected to be victorious, more especially if the intervention of European nations be withheld. The terms offered to the rebels are very simple. The Government says to them, "Lay down your arms, submit to the laws, send representatives to Congress, resume your former position in the Union." The stress of the war may force them to this. Would it then be impossible to obtain a vote of two-thirds of Congress, to propose an amendment to the Constitution, declaring that after a certain date no slave shall be born in the United States?

That would depend on the action of the Border States. Eleven States out of the thirty-four would probably vote against such a proposal, though of these, Virginia, Texas and North Carolina would be doubtful. Considering Maryland

sure to be in favor of such a plan, and the support of it by the North sure also, its success would depend on Kentucky and Missouri. Those States are now claimed as loyal. The number of slaves, and consequently, the value of slave property they contain is small. The persons directly interested in that property form a small class, possessing far less influence than the same class further South, where slavery is the supreme interest and the supreme power. The soil of those States can be cultivated by white labor, and white labor would introduce diversified industry, and speedily make them rival their prosperous neighbors in the North. Slavery must ere long disappear from the Border States, and the people know it. They know also that it would be a good thing for it to disappear. Because of slavery, Kentucky and Missouri have been devastated by war. After the lesson of such experience, a plan that would respect existing interests and social organization, that would not violate State rights, real or fancied, or shock State pride, and that would but hasten an inevitable, anticipated and desired future, would appeal strongly to the intelligence of the people.

The plan would find many advocates even in the more Southern States. There was in them a large Union party before the war. A large portion of their people are not slave-owners, and care nothing for slavery except as marking the distinction of race. The inhabitants of the hill country are averse to slavery. The cause of secession found supporters among these classes, because of the idea, industriously circulated by political leaders, that slavery was threatened with unjust and illegal attack; that the rights of the South had been violated. Menaced coercion caused irritation, and then actual war kindled the passions that always accompany war, and swept the masses into the current, to which direction had been given by these leaders. Even now, there is reason to believe that the ranks of the rebellion have been filled to a great extent by force and terror, the sway of a dominant opinion, and the power of a military government. When peace is restored, these causes will cease to operate. A contest in which military renown has been gained, and valor displayed by both

parties, does not leave behind it animosities that cannot be reconciled, more especially if it leaves common interests to be secured. It cannot be expected, indeed, that the Cotton States, should they be restored to the Union, would consent to any plan of emancipation, however moderate, but there is ground for hope, that if one were proposed, not as a trophy of victory, not revengeful nor oppressive, they would not resist it by another war.

Should some such plan as that suggested be adopted, it would be a signal and glorious triumph of reason, of humanity and of free government. With slavery withdrawn from our politics, which it can never be unless withdrawn from our Constitution, with a real Union founded on the basis of truth and justice, what limits could be assigned to the power, the grandeur, the happiness of this republican empire of the Saxon race!

This war is growing into formidable dimensions. The two billlions make a desperate fight. But truth, humanity and the world's opinion are arrayed against them, and these are stronger than cotton. The two billions cannot muster armies enough to defend a lie. The Gods have not abdicated their heavenly thrones. Either violently in the midst of the war, or peacefully as a consequence of the war, the untruth in our Constitution is doomed to perish. This war is the death-struggle of slavery. It may prove the birth-struggle of a new Union.

## CHAPTER V.

### DEMOCRACY.

In our day, the word democracy is generally understood to mean a representative Government, elected by equal and universal suffrage, and it is usual to call ours a Democracy. Whatever, by reason of inherent tendencies, it may have in effect become, there is no democracy in the Constitution. It says not a word about universal suffrage, but on the contrary, expressly provides against its application to any department of the Government, except one branch of the Legislature, and to that it does not enjoin, but permits its application. The President according to the Constitution is to be chosen, not by a vote of the people, but by an Electoral College, which shall be appointed "by each State, in such manner as the Legislature thereof may direct." The Judiciary is appointed by the President and Senate, and the Judges hold their offices during good behavior. The people have no control over them whatever. The Senate is chosen by the Legislatures of the States, and represents the States, not the people. The choice of the House of Representatives alone is by the Constitution referred to the people, and it provides that those who vote for it "shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

When the Constitution was made, these qualifications varied in the different States. In many of them a certain amount of property was necessary to entitle a man to vote, and this last vestige of conservatism may, perhaps, exist in some of them now. Such a condition, or any other, may be imposed on the right of suffrage hereafter at the pleasure of the States; and should the Union be restored, the Southern States will very probably exercise this privilege, so that the Government may

be subjected to democratic influences from one part of the country, and to aristocratic or oligarchic from another. This, indeed, has already happened, and with most pernicious results. The Southern States, more especially the Cotton States, are really aristocracies and oligarchies, with all the evil and few of the good features of such forms of government. The governing class is not a nobility, with the superior culture and sentiment that accompany high birth. It is not founded on hereditary landed property, the essential element of an aristocracy, connecting it with the past and with the future, creating permanent wealth, independence of character, freedom of thought, local attachments and the love of stability and social order.

Being without the law or custom of primogeniture, estates are divided by each generation, and old families decay, but retain their pride and aversion to active industry and useful pursuits. The distinguishing feature of Southern aristocracy, however, is not land, inherited or purchased, but negro slaves, either inherited or purchased; and its connection with these is not the humane relation of the old baron to his vassals, or of the modern English lord to his tenantry and peasantry, or even of the Russian noble to his serfs, who have personal rights and a vested interest in the soil. The high moral influences of entire or qualified freedom of the inferior classes, and the sympathies created by a common country, and government and race, are controlling and beneficial elements in all these cases. The dependents of the Southern planter are slaves; they are of an inferior race, separated from his own by wide gulfs of disparity; they are not his countrymen; the law does not even class them as men; they have no country, no government, no laws, no rights; they are property, and wholly subjected to his arbitrary power. Because slavery and the negro have prevented the growth of manufactures, commerce, the mechanic arts and educated industry, earning comfort and commanding respect, and have thus thrown all wealth into the hands of the planters, they practically control the politics of the South. Practically, because there is no class to oppose them, but not legally. Theoretically, they are the fellow-citi-

zens of the "poor whites," who seem to be regarded as a caste lower even than the slave. Any one can be a planter, however vulgar, coarse and ignorant, who has money to buy land and negroes.

This practical aristocracy, therefore, is subjected to no influences to secure high qualifications for the responsible duties of government; and as it has no legal rights as a governing body, it has no legal duties, and therefore no responsibility. For these reasons, its sole rule of action is likely to be its own exclusive interest. Such a Government wants the aristocratic element, is a mere oligarchy, controlled by narrow views and sordid motives, and is incapable of liberal desires for the improvement of society or of the spirit of nationality. It will almost of necessity sacrifice all other classes to its own, and the whole country to its own section. To speak, therefore, of the Southern slaveholders as an aristocracy in the European sense, implying hereditary wealth, refinement, high culture, legal position, political power and duty, coupled with responsibility, love of country and interest in its general prosperity, or as a bright conservative land of traditions and manners, connecting the past with the future, is a manifest absurdity. There is no resemblance between them and any past or present aristocracy of Europe, except that they, of necessity, possess most of the vices and evil tendencies attributed to the worst.

It is not intended here to disparage the character of the Southern slaveholders, but to speak of their necessary qualities as a governing class. A Southern gentleman, a Southern lady, warm-hearted, impulsive, high-spirited and refined have been always appreciated and welcomed in the North. To their influence, indeed, much of the power of slavery over Northern opinion may be attributed. Noble traits of heart and mind, elegance and grace, are of a nature to have spectators, and thus win and conquer wherever they appear. But a reputation lingers sometimes after the substance out of which it grew has disappeared. There are not so many Southern gentlemen and Southern ladies now as formerly. Half a century or more ago, the Southern planters in their tastes, habits, sentiments

and manners, as well as in their social position, bore much resemblance to the English country gentleman, that favorite of history and romance. They had wealth, leisure, independence, opportunity and inducement for mental culture, the salutary retirement of the farm and plantation, the means for generous hospitality, field sports and the wholesome physical and moral influences, which mother earth exerts upon her lovers and servants. They were owners, generally hereditary owners, of the soil, the only possible foundation for a real gentry or aristocracy. But the subdivision of property, and the pernicious influence of slavery, have told upon Southern society. The old estates have been broken up, the old names have disappeared or are rapidly fading away. When wealth goes, culture and refinement, after a time, go with it, and are not restored by an upstart growth of newly made wealth. Cotton, meanwhile, has given hideous prominence to the sordid element of slavery. In thought and practice, slaves have been for many years regarded more in the light of property than before, because they have become five times more valuable; and whilst this mercenary spirit has been stimulated into a noxious growth in the planting States, cotton has created the business of slave-breeding in the border States.

No gentry can withstand such influences. It must soon cease to be a gentry; and when it falls, upon what can it fall, and what can it become in the South? Work it cannot, for there is no work to be done. The South has neither trade nor manufactures, nor the mechanic arts to afford worthy and sufficient employment to men of education. Where these are wanting, the ranks of the professions are soon filled to repletion. Small planters, living on fragments of a patrimonial estate, must be poor; therefore must become deficient in mental culture and refinement of manners. The large planters are new men, more especially in the Southwest, to which the sceptre has departed from the Atlantic States. What, then, has become of the gentry? It has almost disappeared. It is no longer a land and slave owner. It is selling cotton on commission in the cities; it is practising law and medicine in towns and wretched villages, or in half civilized, half wild, or

half waste deserts of the interior. Before the war it crowded into the army and navy and bureaus at Washington; it has emigrated, and sought and found honorable employment in the echoing paths of enterprise and industry of the North; or it is hanging round taverns, billiard-rooms, cock-pits, and race-courses in the South, shabby and fine, proud, ignorant, and idle. It is no longer governing the South, or cultivating its soil. It is no longer sending Pinckneys, Rutledges, Haynes, Draytons, Calhouns, Randolphs, and Prestons to Congress, but Wigfalls and Slidells instead. It is no longer spreading bountiful tables, and presiding over elegant festivities in old homesteads, for the old homesteads are falling to pieces for want of broad acres to sustain them. The gentry no longer exists, for the traces left in the Atlantic States have no real influence. But land-owners and slave-owners,—that is to say, speculators in land and negroes, who have bought them to make money,—do exist; and they bear far more resemblance to Wall Street speculators in stocks, than to a class of country gentlemen. Nevertheless, they now rule the South, and have made war upon the Government because they cannot rule the nation. It is a mistake, therefore, to call the South an aristocracy, as is often done. That title it no longer merits. It is now far more of an oligarchy, or a government of the rich,—no matter how they became rich,—and who therefore are not, because of their wealth, educated, refined, or elevated above the habitual influence of sordid and vulgar passions.

Now, it has happened that the Government of this country has been, with short intervals, from the beginning under the control either of the Southern aristocracy, or its successor, the Southern oligarchy. The power and wealth of both have been founded on the ownership of negroes, and the number of owners has never exceeded three hundred and fifty thousand; or, making a fair allowance for those directly interested in such ownership as members of a family, a million of the Southern people, out of a population of ten or twelve millions. There is nothing in our Constitution to forbid or prevent this aristocratic or oligarchic influence. On the contrary, it may

be constitutionally changed by the Southern States into a legal, instead of a practical power, arising out of the ascendency of a class. The suffrage may be restricted to the owners of slaves, and the whole South be converted into an oligarchy of the narrowest character, at the pleasure of the Southern States; and by such limited suffrage the President and Congress, the House of Representatives directly, and the Senate indirectly, would be elected.

Democracy, therefore, is not in the Constitution. The direct action of universal suffrage is indeed expressly prohibited, except upon the House of Representatives, and both that body and the Senate, and the President,—the whole Government in short, except the Judiciary, may, at the pleasure of the States, be controlled by influences the very opposite of democracy.

Whilst in the South the predominance of an aristocratic element has degenerated into the sway of an oligarchy, the power of democracy has steadily increased in the North. It has abolished all restrictions on the right of suffrage; it has, in most of the States, seized even upon the Judiciary; and it has applied the ballot-box also to the appointment of sheriffs, prothonotaries, justices of the peace, constables, and a multitude of other petty officers, so that the masses exercise a control over public affairs as absolute as is consistent with the existence of a representative government. Equal and universal suffrage, thus dominant in the Northern States, elects the House of Representatives and the President. There is no supreme interest or governing class in the North; none who are tempted by any motive to make an effort to govern. Property is so generally diffused that all are interested in its protection; and though there are many rich men, there is no permanently rich class. Hereditary wealth is rare, and confers no influence social or political. Land is generally divided into small farms; activity and enterprise, stimulated by the rapid development of the country, are constantly bringing forward new men into the upper ranks, whilst those who have inherited education and a position, but not fortune, easily find a sphere of honorable and profitable activity.

Out of the large cities there is nothing that can be called a mob. Throughout the vast farming regions of the interior, though great wealth is not uncommon, moderate competence and universal plenty prevail; and with them a happy and generous equality of manners, in which social superiorities are recognized, without servility on the one side or condescension on the other. Education also is general throughout the North. It is impossible to say that any class, as such, is ignorant. Whilst mental culture of a high order is rare, it is almost equally rare among rich and poor; and the standard of intelligence among the masses is elevated. They participate, by means of the press, in the action of the Government, and the great movements of the world's rushing thought. Ideas now are winged by steam, and fly across mountains and the wilderness into every remote nook of the country, and there find minds and hearts ready to receive them. The present war has displayed the wondrous power of the railroad and the telegraph to enable a people to think simultaneously; and has showed, also, what a people able to think can do.

There is neither an educated, nor rich, nor poor, nor ignorant class in the North; though there are poverty and wealth, knowledge and ignorance. These are constantly changing their subjects, and social distinctions are plainly though not sharply defined or separated by steep contrasts and difficult barriers. A general equality of condition, desire for material well-being, love of home and domestic enjoyments, of industry and its rewards, and consequently moral elevation and mildness of manners, are the characteristics of Northern society.

One might think that the two sections of the country, inhabited by a people thus constituted, would each find its complement in the other. That as the cotton-fields of the South, the grain-fields of the West, the mills and workshops of the East, supplied mutual wants, so the conservative element of Southern society would give moderation and stability to Northern democracy, which, in return, would impart something of its own spirit of movement and progress to the aristocratic and oligarchic tendencies of the South. So it happened till a recent period of our history. But action and

reaction, centrifugal and centripetal force, must be nicely adjusted to produce harmony and order, both in the moral and material world. Should either predominate, confusion and the crash of collision are inevitable. Under the free scope left by the Constitution to the elements of Southern and Northern society, slavery first caused discontent, which ripened into discord, and that at length has reached the point of open and destructive war.

The Constitution has failed to prevent this war. It left the Government open to the action of the causes that produced the terrible conflict which is now covering with blood and tears and desolation some of the fairest regions of our country, and which involves no less a stake than the life of the nation and the hopes of the future. The Constitution is neither an aristocracy nor a democracy, and makes no provision whatever against the selfish and exclusive spirit of the one or the wild license, the reckless passion and the blind folly of the other. Whatever checks are to be imposed upon either must be imposed by the people of the States, that is to say, must be imposed by the people upon themselves or else by disastrous events leading to violent revolution. It is expecting much from an oligarchy to hope that it will deny its nature and regard other interests than its own. It is expecting much from the masses of the people, that they will voluntarily put restraints upon power, the free exercise of which they have once enjoyed. Is it expecting too much? Upon the decision of that question the fate of this Government depends.

No one will deny that our present troubles grew out of the antagonism between the North and the South; but as is usual in such cases, neither side is willing to take on itself the blame. One party says that Abolitionism, the other, that slavery was the cause of the war. They are right thus far, each was a cause; neither was the sole cause. It is very true that if the Northern people had yielded to all the demands of the South, or if the Southern people had been willing to abolish slavery, or to impose upon it such restraints as Northern sentiment required, there would have been no war. But neither party would or could yield to the extreme views and

claims of the other. Between these, however, there was a safe path for both, the path of mutual forbearance and concession, traced out in the Missouri Compromise by judicious men, when the same question was agitated before. That compromise may be regarded as the expression of the general sentiment of the country when the action of South and North on each other was safe and mutually beneficial. It gave us peace for nearly half a century. It was sustained by the opinion of the whole country. It was a solemn compact or bill of rights between North and South, made for the sake of peace; and had it been kept, peace, because of slavery, might never have been broken. But it was not kept. It was violated by Northern Democrats for the purpose of conciliating the South. The ill deed took the country by surprise. No warning had been given, no expression of popular opinion from North or South had called for such a step. But suddenly this law, which was more than a law, a compact of union and friendship, was set aside by political managers, and all sectional and party passions were roused from their long repose and summoned to deadly strife. These furies obeyed the call, and we are now in the midst of the results,—battle-fields soaked in brothers' blood and daily telegrams of slaughter.

The repeal of the Missouri Compromise indicated a change in the moral condition of the country. The governing class in the South had degenerated, as already stated, into an oligarchy. It had lost the spirit of nationality and become exclusive and sectional, wholly devoted to Southern interests and objects. Northern politics had become corrupt. The quadrennial game of chance, called the election of a President and the abuse of Executive patronage, had rendered public life more a money-making pursuit than a career of honorable ambition. The Southern leaders of party joined in this game with feelings less personal than those of their Northern friends. They had a real interest to protect from threatened attack. They were determined to govern the country, because they feared that if they did not, their section would be governed by their enemies. The Northern people had no vital interest immediately at stake. The great majority cared little about

a tariff, and acquiesced in slavery. The fanaticism of the Abolitionists did not reach them. It was impossible to excite them about a moral sentiment which touched neither their material well-being nor their passions. When the people are not excited, parties are easily controlled by politicians. The leaders of the Democratic party, needed the help of the South, to give them office and power. The people of the South needed the Democratic party to defend them against the dreaded strength of the Abolitionists. Both counted on the cohesive power of party-spirit, the love of victory, the habit of acting together and the disciplined organization of the Northern Democracy.

They were right so far as slavery was concerned. It was protected, not only by the Democratic party, but by the apathy of the great majority of the Northern people, combined with their good will for the South and love for the Union. Slavery would have been safe had the Missouri Compromise been respected. Even its repeal excited but little interest in the North, because the results were not obvious or immediate. Its avowed object, to permit slavery to go where the people of the Territories wished to have it, did not seem dangerous or unjust. There was nothing in such a purpose or result to offend the Northern masses, certainly nothing to endanger the ancient alliance between the South and the Democratic party. But when it appeared that the real design of the measure was to force slavery into the Territories, where the people did not want it, where they earnestly protested against it, the case was altered. The vital principle of American liberty was assailed, the most sensitive and passionate instinct of the Saxon heart was revolted, Democracy itself was contradicted and insulted. Was it for this, then, that a fair and honorable compact had been broken, and a great measure, designed and perfected by the patriotic labors of wise men, to promote union and peace, and sanctioned by time and success, had been set aside by demagogues? Slavery instantly vanished from the contest, or was only thought of as the abhorred cause of a base bargain and a gross injustice. The pulses of the North began to beat. The people were summoned from industry and

business to the contests of parties, else scarcely heeded. When in rapid succession followed the violence and fraud, the scenes of bloodshed and tyranny in Kansas, and finally the monstrous outrage of the Lecompton Constitution, the ranks of the Democracy wavered and broke, deserted by the best portion of it, who preferred justice, liberty and their country to party ties. Then followed the election of Mr. Lincoln, which was the protest of Northern sentiment against Southern dictation and Southern crime, not against slavery. And soon after, when the South made war on the Government, America displayed the sublime spectacle of the uprising of a great nation, the unanimous and passionate rally of the people around their flag.

Now, the question is, why were these things done? It is in no sense a party question, but is connected with principles of our Government and elements in the character of our people that command the future. The motives of the Southern people, and the reason why those motives were free to govern their action, have been already explained. But they could have done nothing without the consent and aid of the Democratic party. It was in the power of that party to say to the South, at any step in the progress towards war, even the last, "Thus far shalt thou go and no farther." Had the Missouri Compromise not been repealed, there would have been no war. Had the successful attempt to elect a Legislature for Kansas, by force, not been adopted by the Democratic party and its President as a party measure, there would have been no war. Had the Government repudiated the abominable laws passed by that Legislature, instead of using military force to execute them, there would have been no war. Had a Democratic President recommended the rejection of the infamous Lecompton Constitution, instead of attempting to force it upon the Kansas people, there would have been no war. When Mr. Lincoln was elected, and the Southern people were threatening disunion and preparing for it, had they received, not sympathy, but rebuke, from Northern Democrats and a Northern President, there would have been no war. When, at length, rebellion declared itself by action, and the Southern

leaders began to enlist troops, and to seize on the forts, arsenals and navy yards of the Government, had a Democratic President used, with prompt vigor, the force at his disposal, and called on the Northern people to support him in defence of the Government, the rebellion would have been checked and quelled ere it became dangerous. So that from the beginning, as the leaders of the Democratic party had absolute control over the causes that produced the war, it may be regarded as their work. They united with the South in every step of its mad career, until the cannon of Fort Sumter broke the spell, and revealed to them the surprising fact that Democrats were, after all, Americans, and that the best and most numerous portion of them had deserted the party for their country.

Was it to protect slavery that Northern Democrats sustained the South in all its extravagant demands? None knew better than they that slavery was perfectly safe, whatever the alarmed and exasperated Southern people might think, or be deluded into imagining, of the power of the Abolitionists. Politicians are experts in counting votes, and their business requires them to be learned in the statistics of popular opinion. The Democratic leaders, therefore, were well aware that the Abolitionists, as a political party, had no power, and that the great mass of the Northern people were willing, not to attack slavery, but to defend it in all its legal rights. But if slavery was menaced by any party in the North, liberty and justice were assailed in Kansas for the sake of slavery, and the Southern Democrats distinctly threatened to destroy the Union if a Northern candidate was elected President. That declaration did not break up their connection with their Northern allies. It produced, indeed, a division in the party, but the extreme Southern section of it had a powerful support, in the North, at the election which closed with the triumph of Mr. Lincoln, and up to the beginning of the war, and indeed still has sympathizers and well-wishers in the North, although, with its candidate in that election, it is now in arms against the Union.

These are remarkable facts. It is easy to understand how the Southern oligarchy, with their one interest and one insti-

tution, on which all that they have and all that they are depend, should be roused to passionate and reckless efforts to resist any attack on slavery, so vulnerable to opinion, and that they should be incensed at the reproach which such attacks imply. But there is no slavery in the North. There are no great interests in the North menaced by the Abolitionists, except, indeed, manufactures and trade, which are not members of the Democratic party. The Missouri Compromise certainly did not injure the North. No Government ever pressed more lightly upon the people than ours, or made itself felt so entirely by benefits, and not by burdens, as ours. No one feared that it would or could, even in the hands of a "Black Republican" candidate, oppress or injure any class in the North. The Union has surely been an unmixed blessing to the North, whatever may be thought of it in the South; and secession, should it succeed, and establish a prosperous and powerful nation, founded on cotton and slavery, cannot possibly be a good thing,—must, indeed, be an evil thing,—to the Northern people, Democrats included. How is it, then, that any portion of the Northern Democratic party conspired with the South to repeal the Missouri Compromise, to overturn the Government, and to destroy the Union?

If one could answer that question, it would go far to explain the true nature of Democracy in this country, to reveal its tendencies and dangers, and to suggest the means of resisting them. A tempest shows defects in the ship, and the strain of this war ought to show to observant eyes the weak points of our Constitution. Why did it not prevent the war? Why is the rebellion now more than a year old, yet still with armies in the field, and the issue doubtful? To get at the true cause of the mischief, we must first dispose of certain influences, not strong enough to be causes. Slavery and its consequence, the oligarchic element in Southern society, did not alone cause the war, or rather were not the proximate causes of it, for sooner or later slavery, which is in its nature aggressive, must have led to war. The South is weak, the North is strong. The whole power of the South, as such, depends upon its alliance with some party in the North. Therefore, as already stated,

however passionate, violent and aggressive the South might have been, that party might have held it in check at any period of the contest, from first to last, by resisting its unreasonable demands.

Abolitionism did not cause the war. As a political power it was weak, because as an element of popular opinion it was weak. Its strength rested on disinterested enthusiasm for abstract moral truth. Such enthusiasm is far above the mental level of the masses of any country. That it should reach them or move them to action, unless connected with their own interests, is simply impossible. To feel any interest in a question such as the liberty or happiness of an inferior and distant race, requires a high degree of intelligence; to feel enthusiasm on such a subject, to become fanatical about it, requires culture and a sensitive moral nature, which can be predicated only of a very small and select class. We therefore find the Abolition sentiment confined almost exclusively to New England, where property and education are more generally diffused, where literature has a wider and stronger influence, and where the love of liberty is more intense, because the people are of purer Saxon blood, than in other parts of our country. Even in New England, however, the anti-slavery sentiment did not, among any large portion of the people, reach the point of enthusiasm, leading to Abolition as a measure of Government, or to interference with Southern rights. It was controlled by the love of Union and respect for the laws. Enthusiasm was the attribute of individuals and a small circle of their followers. A few persons of eloquence and high intellect, unconnected with party interests or purposes, free from any personal motive or ambition connected with the subject, but dominated by a great and noble idea, were the fanatics who frightened and enraged the South. One of them was a woman of genius, a true artist, who shot at slavery some keen arrows, pointed with truth and winged with fancy. Others were quiet scholars, students and thinkers, such as Wendell Phillips, H. W. Beecher, Theodore Parker and Emerson, men whose works have given lustre to the literary fame of the country, and whose most extreme

opinions are on a level with those of the same class in the cultivated capitals of Europe.

Such opinions cannot become popular, any more than the works of Bacon, Kant and Plato can become popular. Truth must be concrete to reach the mind or touch the feelings of the multitude. This deficiency and weakness in the cause of Abolition the madness of the South supplied. They attacked Northern rights for the sake of slavery. With inconceivable folly they undertook to put chains on the stalwart limbs of Northern strength. Then, for the first time, after the lapse of many years, the masses of the Northern people were made aware of the existence of slavery in the South as an important national fact. Then, for the first time, they were led to notice it with attention. The sight was not pleasant, for slavery is far from beautiful, and at the moment its look and attitude were not friendly, hostile indeed, giving tokens of a disposition to threaten and command. Even then, however, the proud North, conscious of strength; the calm North, slow to anger; the patriotic and law-loving North, imbued with the spirit of Union and nationality; the humane North, thinking of the possible horrors of servile war; the Saxon North, sympathizing with their own blood in the South, which disdains equality with the negro; the manufacturing and commercial North, not unmindful of cotton,—could not determine to destroy slavery, ugly as it was, and an enemy full of spite and venom. It went no further than to say, "Let us keep it where it is. It is an ill-looking thing and a mischievous. Not good can it do but evil, anywhere. The Southern people, it seems, love and worship it. They are welcome to it, but it shall not spread into the Territories. We intend these as the destined seat of a great empire of Saxon liberty and civilization, not as the home of Africa and slavery. The Southern people broke the Missouri Compromise to carry slavery north of its appointed boundary. We are thus released from that compact, and will carry freedom south of that boundary." There is nothing abstract in these opinions, no enthusiasm, no fanaticism. They are thoroughly practical and thoroughly Saxon, springing directly out of the dominant

passions of the race, love of power, love of liberty and love of land. Dreamy reveries about educating the negro up to the level of the white, Utopian visions of a civilized Africa on this or any other continent, wild plans of general emancipation, never entered the heads or the hearts of the people, never voted for Fremont, never poured forth through all the hills and valleys of the North, the fiery flood of feeling, which, by the mercy of the Gods, floated Mr. Lincoln into power. The privilege of not being governed by the South was what the Northern people, being a majority, demanded; liberty for themselves, not for the negro, and so far as the Territories were concerned, as a Western election song expressed it,

"The right to the soil,
And the right to toil."

Abolition, therefore, as a sentiment, an opinion, a faith, a fanaticism or an element of political power, was not the cause of the war.

But it may be said the Republican party, because of the opinions above expressed, held by the great body of it, did cause the war. They attempted to restrain the South, they implied disapprobation of slavery. But the repeal of the Missouri Compromise and the results that followed, created the Republican party. Until the occurrence of these events there was no political party in the North, of any influence, organized on the basis of opposition to slavery, nor would have been, had the Compromise been observed. It was broken for the purpose of securing Kansas to the South. Slavery became aggressive and provoked Northern resistance, which took the form of the Republican party, and this aggression, which might have been checked, was permitted, encouraged and adopted by the leaders of the Democratic party. The forcible election of the Kansas Legislature by Missouri votes, because thus supported, almost elected Fremont; the Lecompton Constitution did elect Mr. Lincoln, and, notwithstanding all these causes of complaint and irritation, the great mass of this party never dreamt of any attack on slavery as a vested interest and a Southern institution, but were at all times

ready to protect it in every constitutional right. The proof of this is the nomination of Mr. Lincoln instead of Mr. Seward, the acknowledged leader and eminent man of the party. His name had become so much identified with extreme opinions on the subject of slavery, that he was dropped because it was feared that he could not be elected. Another proof is that Mr. Lincoln, sustained by the great majority of those who voted for him, has been from the first, and is at this moment resisting the Abolitionists and defending slavery, which even in the midst of a war of which it was the cause, exists only by reason of the protection thus afforded by the conservative men of the North.* With these may be classed the party who voted for Mr. Bell. Their opinions varied but little from the great body of the Republicans on the subject of slavery, the difference between them, as parties, being that the latter contained a certain proportion of Abolitionists from which the other was free. Thousands hesitated between Mr. Lincoln and Mr. Bell, and voted for the former only because they did not think it possible to elect the latter. Thousands voted for Mr. Bell only because they feared the Abolition element of the Republican party.

Party names are here used only to represent certain opinions and classes of the people. Democracy or popular government, so far as it is established by our Constitution, is now on its trial. It is very evident that our present troubles might have been prevented by the exercise of sufficient intelligence by the people. Truth and justice, had they guided the movements of parties, would have prevented them. A defect, therefore, exists somewhere. If in any portion of the people, then the Constitution should have excluded the influence of that portion. If not in the people, then the machinery intended to apply the popular will is badly contrived. If Democracy itself be an evil and dangerous thing, then those who made the Constitution should have imposed upon it effectual restraint; and

* On the day these lines were written, May 20, Mr. Lincoln's Proclamation was published, disavowing the act of General Hunter, who had just declared all the slaves of Georgia, South Carolina, and Florida, free.

we who hope to live under the Constitution must, if we can, protect it and posterity from the danger of Democracy. We have eliminated from the discussion, as not having caused the war, the Abolitionists, by which term we mean those who advocate interference with slavery in the Slave States, the Republicans, the friends of Mr. Bell, and the Southern people; the last, however, only because they were too weak to perform such a feat, without the assistance of some party in the North. The Democratic party only remains, and on a previous page has been mentioned as the cause of the war. By this was meant its action as a party, by means of its constituted authorities or leaders. Nevertheless, as it had such leaders, the dangerous element of our Government, against which the Constitution failed to provide, must lurk in this party. It was always in alliance with the South, and always supported the Southern side of the great issues that have divided the country. It was honest in that support, and the alliance was beneficial to the country, inasmuch as it was a check on sectional divisions. But the alliance was maintained after it should have been broken, and the support continued when it should have been withdrawn. The exactions of the South, however, soon divided the party. A large portion of it refused to accede to them, and when the war commenced, gave their votes, their talents and their blood to the cause of the Government and the Union. This section was represented by Mr. Douglas. It is true that he was the author of the Kansas and Nebraska Bill, by which the Missouri Compromise was violated. But the construction he put on that bill was, that the people of the Territories should be at liberty to accept or reject slavery as one of their "domestic institutions," a construction which, however unconstitutional, accords with the instincts of the American people, and with the principles of our Government, the true doctrine being that whilst Congress has supreme power over the Territories, constantly exercised from the beginning, to prevent or prohibit slavery, yet the power ought to be used in accordance with the wishes of the people of the Territories. Had it been so used, there would have been no war. The Douglas section of the party refused its sanction to the Kansas outrages, and

helped to defeat the Lecompton Constitution. It certainly was guilty of repealing the Missouri Compromise, and it favored unworthy concessions to the South after the rebellion begun. But it is believed since to have become merged into the Republican party, or carried away by the current of patriotic feeling, excited by the war, to give a hearty support to the Government in its efforts to restore the Union.

The pernicious element, therefore, which has shown itself so powerful for evil, does not infect the whole of that portion of the people classed as the Democratic party. It is a fortunate circumstance, arising from the condition of our country, that social distinctions do not form the dividing lines of political parties. The European idea of Democracy is, that it is the government of the lower classes, therefore of mere ignorance and poverty; and, as a consequence, incompatible with the security of order and property, and with the legitimate rule of knowledge and intelligence. This is no doubt true of any European nation, and is the reason why monarchy and aristocracy are maintained, as the only defence against anarchy or the degradation of government to the level of the multitude. But the scope offered to enterprise and industry, the abundance of cheap land, the vast undeveloped resources of the country calling for labor, the ease with which property is acquired, the absence of an ancient privileged class, the sentiments of equality, and the constant exercise of political liberty, have created a very different state of things here. The words rabble, canaille, mob, are inapplicable to any considerable portion of our people. Our "dangerous classes" are not strong enough to create revolutions. Our working classes have work, bread and liberty in abundance, without fighting for them. They are prosperous enough to desire order and law, intelligent enough to understand that these are essential to their well-being, and are not jealous either of wealth or political power, for they may aspire to both.

The Democratic party with us therefore is not a representative of mere numbers, brute force, ignorance and radicalism. It does not make war upon property, order, refinement and education, and therefore we are in no danger from attacks on

the primary institutions of society, from agrarianism, socialism or red-republicanism, with which the rise of democracy threatens the nations of Europe. Nevertheless American society is not entirely free from the elements of evil which pervade the lower classes in the Old World. We have an uncertain and fluctuating, and there is reason to fear, increasing quantity of poverty, vice and ignorance, collected for the most part in our large cities, but also scattered abroad in manufacturing, and even in some rural districts. We have also the Celtic race, unaltered through ages, and exhibiting the same characteristics here as in France, Ireland, Wales, and the Highlands of Scotland, possessing many fine qualities, but unable to keep pace with the Saxon in the march of civilization, and unable, as its history shows, to appreciate, establish or maintain civil liberty.

Liberty combined with order and law, steady progress in mental and material improvement, belong and have always belonged exclusively to the Teutonic races. It is said that there are now more Irish in this country than in Ireland. They come here to work it is true, but also to vote. We are told that they are soon merged in the great mass of our people. But they are not merged. Everywhere they occupy the lowest ranks of industry. Everywhere the American is the master workman, takes as his right all the places which require thought, and everywhere his mind guides the Celt, who performs those labors which demand the least degree of mental power. The Celt is the day laborer, the servant, seldom an owner of land, a manufacturer or mechanic, has no aspirations for improvement, rarely exhibits in his home and its surroundings a love of order, comfort and neatness, and does not like the Saxon carry in his brain wherever he goes, the idea of towns, cities, schools, factories and free scope for effort, a picture of a social condition, by which he is tormented until he can realize it. As the Celt is incompetent for the higher branches of industry, he is indifferent to their rewards. He is capable of strong attachments, is passionate and impulsive, fond of excitement, and a lover of war and glory. He thus makes a good soldier, and has a natural tendency to *esprit de*

*corps*, and obedience to a leader. The Scottish clans, the inevitable military despotism of France, the thorough union of feeling and action among the Celtic population of Ireland, and the control over the race exercised by the Catholic Church, exhibit this tendency. The Celt is thus exactly what a leader of any sort would desire, a passionate and devoted partisan, ready to obey orders without asking questions. He is prized, therefore, by a Highland chief, a Catholic priest, a French emperor and an American demagogue.

The Celt has become a most important constituent of our society. He is planted irrevocably in the middle and temperate zone of our country, as the negro is in the South. He is far superior to the negro,—superior, indeed, to the Saxon in some of his attributes,—more warm-hearted, generous and enthusiastic, but he prefers war to peace, idleness to industry, ignorance to knowledge, license to liberty and despotism to republicanism. Natural laws provide that the races of men shall remain separate. They will forever keep the Celt apart from the Saxon in this country, as they have done in Europe. Permanently, therefore, we have got both Ireland and Africa in America.

The Germans who emigrate to our shores in such multitudes are very different from the Irish, both in character and their influence on the future. Some of them are of the lowest class, and bring with them only their poverty, ignorance, vices and radicalism. Others, particularly from the North of Germany, where the blood is more pure than in the South, are intelligent, educated, skilled in various arts of industry and possessed of property. They are all of the great Teutonic race, capable of improvement, lovers of order and constitutional liberty, of science and literature. These attributes, as well as their kindred blood, assimilate them to the Saxon, with whom they easily amalgamate, and thus, unlike the Celt, become soon really merged in the great mass of the American people.

Now most of these elements of American society which may be classed as dangerous, belong to the Democratic party. The Celtic portion of the Irish population, that is, the Catho-

lic Irish, belong to it exclusively. The German emigrants, more especially the radical part of them, attracted by the name, belong to it very generally when they first arrive, but neither they nor their descendants adhere to it with tenacity. The foreign population includes most of the vicious, ignorant and disorderly elements of our society in town and country. Our prisons and almshouses do not contain many Americans. There are no doubt drunkards, paupers, idlers, rowdies and criminals among our people, but they do not belong exclusively to any party, although it may be said, that they have a natural inclination to Democracy in the European sense, that is to say, against the sober and conservative principles of order and obedience to law.

Equality of condition, such as exists in our Northern States, induces a tendency towards the formation of parties, and a habit of obedience to party discipline. A vast multitude of individuals, with no persons or classes among them much more forcible than the others, or distinguished by marked disparity of wealth or knowledge, feel the necessity of government for the sake of security and tranquillity. They differ in their views, and thence parties arise. But each member of the party being weak, knows that he has strength only as a member, and that the efficiency of the party depends on its organization, just as each soldier of an army knows that he himself is nothing out of the ranks, and that the success of the cause in which he is engaged, as well as his own safety, depend on discipline and obedience. Now ignorance is weakness, and poverty is weakness, and the party, therefore, which contains the largest proportion of these, will be the most thoroughly controlled by party rules, and will yield the most implicit obedience to its leaders. Intelligence likes to judge for itself, wealth inspires a sense of freedom and independence. Their demands must be satisfied, and therefore, the vote of a party which is composed for the most part of the rich and educated, is not to be counted on with certainty. In an aris-

tocracy, individuals are powerful; in a republic, interests and opinions. Great interests, such as commerce and manufactures, demand protection, and great principles, appreciated and valued by cultivated intelligence, demand satisfaction. Ignorance and poverty make no such demands, because they have no such wants. Nevertheless they love power and victory, and these are all they ask of their party leaders.

This analysis of American society will explain the causes of the war. The alliance of the South was necessary to give power to the Democratic party, and the South demanded compliance with all its demands as the price of power. The leaders of the party counted on old ties and sympathies, discipline, organization, and the possession of power to secure the adhesion of its members. They counted on old party cries and prejudices, on the Celt and the rowdy, the grog-shop and the alley, Tammany Hall and the Empire Club. But they went too far. They left out of their calculations the great fact of a human conscience, of moral sentiment, of the American inbred love of liberty. They thus divided their party and caused its defeat, but not in time to save the country from a dreadful war and a doubtful future. A corrupt alliance between Southern oligarchy and the evil elements of Northern democracy, has produced a contest between both and the American people, which threatens, and may yet destroy our Government and the Union. Southern oligarchy is founded on the negro; Northern democracy is in the Middle States dangerous, because of the Celt. Are then liberty and civilization here as in Europe to be confined to the North? Is it true that neither can flourish except where the snow-flake falls? That the energetic, Teutonic man, bold, adventurous and constructive, whenever he advances into the fertility and beauty of temperate and Southern climes, must in the end recede before the Celtic and the dark races, and find a home only among rocks and mountains, ice and granite?

Regarding the war as a test of the Constitution, one im-

portant fact has been developed in its origin and progress: it is the work of a small minority of the people; not a minority resisting the tyranny of a majority, but an aggressive, violent minority or faction, making an unjust assault on the Government. A portion of the Southern people in combination with a section of the Democratic party, or rather the political leaders of each, expecting the support of the whole party, caused the war. And these are precisely the dangers under Democratic institutions, the sway of demagogues arising from the indifference of the masses to political questions, and the ease with which the people are deceived, because of their inability to judge immediately of the tendency and results of important measures. The multitude rarely reason, and do not see events in principles and effects in causes. Absorbed in private occupations, having few opportunities for the discussion and mental collision that elicit thought, reading chiefly their party newspapers, the mass of men are prone to put their faith in established guides. Not till erroneous principles have brought about disastrous events, not till dangerous causes have produced the fact of evil, are the people roused, and then it may be too late. Eternal watchfulness, as has often been said, is the price of liberty. It is also the price of safety in a democracy, more especially in periods of tranquil prosperity, when the love of material well-being engages all minds, and rapid wealth inspires a universal greed of gain. Public opinion thus becomes utilitarian, politics a trade. The spiritual powers that rule mankind are invisible to the eye of sensuality, and when all classes are alike busy in one engrossing pursuit, with no Brahmins for moral guides, and no sentinel on the watch-tower to sound the alarm, the enemy may easily enter the gate, and the castle be surprised and taken. Peace and plenty enervate a people. Moral sentiment is weakened by the taste for riches and the habit of sensual enjoyment, the external overpowers the internal, matter dominates over mind and dulls the soul to the spirit of patriotism and of freedom.

> "For what more oft in nations grown corrupt,
> And by their vices brought to servitude,
> Than to love bondage more than liberty;
> Bondage with ease, than strenuous liberty."

Into this bondage the country was gradually falling. The dignity, the honor, the independence, the respectability and self-respect of the North were in far greater danger from the combined powers of slavery and the Democratic party, than the South ever was from Northern opinion. The material benefits conferred by the Union were so obvious and so vast, that it came to be valued over much, because valued chiefly for these. Slavery acquired undue importance, because its protection was regarded as essential to the Union. Every new demand of slavery was accompanied by a threat of secession, if not granted. To resist these demands, therefore, was to endanger the Union.

This argument was constantly used, and with great and increasing effect, appealing as it did to love of country, to love of peace, and to love of money. It was resisted by the few who prefer truth and justice and the eternal right, to all of these. But their voices could not penetrate the thick folds of selfish conservatism, nor reach the minds of the people, unless aided by the clarion blast of deeds and facts. We may thank the South and the Democratic politicians for the gross outrages and crimes that, at length, broke the spell which was gradually spreading its slumberous and fatal influence over the nation. Had party leaders been more adroit, we had been lost. Hard blows, like Kansas raids, the Lecompton Constitution, and hauling down our flag at Sumter, were necessary to rouse us from our false security, our base compliances and our dreamy lethargy. We had become worshippers of cotton and corn, of farms and mills, of banks and railroads. When the South threatened disunion, vested interests turned pale. The one moral element left in the politics of the country was Abolitionism. It alone spoke of duty, of truth, of justice, and a higher law than the rules of arithmetic or the Constitution. It was answered by the cry of cotton, commerce, Union, the Constitution, and cent per cent. These were not ashamed to ridicule any higher law. Abolitionism was weak. It was stifled and overcome by prosperity and the Democratic party. The term Abolitionist became a word of reproach, and every man was called an Abolitionist who did not echo the extreme

sentiments of the South. To hint that slavery was an evil, that slave-trading and slave-breeding were inconsistent with any high standard of Christian civilization, that slaves were really men, and not mere things, was to be an Abolitionist.

Those who ventured to express such opinions found themselves coldly received in society, if not excluded from it. The entrance into public life, except in certain very limited districts, was barred against them. Gentlemen of literary reputation, who had the hardihood to utter these sentiments in Northern cities, were mobbed, and, with their audiences, required the protection of the police. They were accused of uttering "incendiary doctrines," which might incite the slaves to insurrection. It was said that such things were "offensive" to the South, and might "irritate" them to destroy the Union. What, then, would become of our Southern trade, and our vested interests? Even after the rebellion was actually in arms, vested interests called town-meetings, deprecating Southern wrath, offering "concessions" to the South, and promising that the North should behave better in future. Had the mad South even then been able to see its true position, and frankly yielded, willing to take its chance with its old ally to help it, under Mr. Lincoln, the storm would have passed away; the cry against Abolitionism would have been revived; free speech and a free press on the subject of slavery would have been silenced; and the impudent threat of a Southern senator, that he would ere long call the roll of his slaves on Bunker Hill, might perhaps have been executed. But the boom of Sumter's guns reached the farm-houses and workshops,—reached the real people, and thrilled their hearts. Their country's flag fired on by traitors, was not an abstract principle. It was something concrete, which they could thoroughly understand. They did not wait to think, but leaped at once to action. It is but just to say that vested interests; commerce and manufactures, banks and railroads, mortgages, ground-rents, and scrip, were touched by the same noble rage, and poured out freely both their money and their blood. It was and is a noble spectacle, and will do more to

make us a nation than years of peace, prosperity, and demagogueism.

It thus appears that the war was caused by the politicians, and not by the people. Even in the South, except in South Carolina, a majority of the people were opposed to secession. So they voted when they were allowed to vote, notwithstanding all the efforts and arts of the politicians, to "fire the Southern heart," by passionate harangues and gross misrepresentations. Most of the Southern States were precipitated into secession by the official acts of partisan leaders. The great majority of the Northern people, as already shown, were loyal and friendly,—almost submissive to the South. The fact, therefore, that this war has been caused by politicians, acting against the wishes of the people, must be attributed to some defect in the electoral machinery of Government, by which it fails to represent, and carry out promptly and truly the enlightened opinion of the nation. The Constitution, as already stated, provides no such machinery, except for the election of a President, and this has not been used. But the politicians have invented an instrument of their own, called a nominating convention, and have applied it not only to Presidential elections, but to all others. The merits and defects of this machine have been discussed in the chapter on Executive power. Obviously its tendency is to concentrate the control of the political action of the country in a few hands. The conventions are really electoral colleges. They really choose all the officers of the Government not appointed by the Executive. They present lists of candidates to the people, and no one can be elected not on those lists.

The action of the people, therefore, is indirect. Their opinions, in passing through another body, are discussed, modified, sifted, and winnowed according to the character of that body. It is obvious, therefore, that on the organization of nominating conventions the whole working and success of the Government depends. They may, according to their nature, become an admirable contrivance to moderate the passions, check the rashness, correct the ignorance, and represent the wisest and best opinions of the people; or they may

serve only as blind agents of reckless popular folly and prejudice; or they may pervert the immense power intrusted to their hands into an instrument of corruption and selfish gain. As it is impossible for the people to select candidates for themselves, some plan of party action, by which they can be selected and presented to voters, is matter of absolute necessity.

The only plan yet devised is the election, by each party, of men chosen for that purpose, who are supposed to be acquainted with the wishes of the people of a district, and with the qualifications of aspirants for office. But a double duty is thus imposed on the people. They must first vote for the convention, and again for the nominees of that convention. The first duty is habitually neglected by the busy and active portion of society, unless their interest is excited by some crisis in public affairs, and often not even then. The regular elections appointed by law are so numerous, that they make large demands on the time and attention of the people. Many do not care to vote at all. The farmer will not leave his plough, the merchant his counting-house, the mechanic his workshop. The election for a nominating convention is generally unheeded by those whose influence would be most important. The choice of delegates falls into the hands of party leaders, supported by that numerous class, who, having no absorbing interests or duties of their own, love the excitement of politics. The least intelligent part of the people, therefore,—those who are most easily excited and drilled for party action, really do, in the normal condition of affairs, elect the conventions.

The consequence must of necessity be, that men unfit for so responsible an office are frequently chosen. Too often they are unable to appreciate the qualities necessary for public trust. More frequently they view such qualities with aversion and dread. Men of honorable character and cultivated minds are not likely to become pliant tools in the hands of party managers; nor do such men care to solicit the votes of demagogues and trading politicians. The convention naturally selects those who are like its own members in social

rank, manners, and education; why not also confederates in their own dishonest and selfish designs? A convention is open to every sort of intrigue and corruption. Its organization affords no security for the intelligence and purity of its character, which, if evil, effectually bars the entrance into public life against the best talent and highest virtue in the country. Yet to such hands the politics of the whole country are confided. The conventions select the President and Vice-President, members of Congress and of the State Legislatures, State officers, and a host of other officers who wield the power of the Government.

We see the result. Public life is shunned by men of cultivation and refinement. Official station implies neither high character nor high ability, and confers no distinction. But it confers the opportunity to make money, and to enrich relatives and friends. The consequence has been, a degree of corruption disgraceful to the country and the age. The "lobby" has become an institution,—a sort of sub-Legislature or "Kitchen Cabinet." At every session of Congress a committee is appointed to investigate the frauds of its members and of the Executive departments. Bribery is almost acknowledged as a part of legislation, whilst dishonest jobs and contracts so abound, that they are regarded as things of course. Even in the midst of the patriotic and noble feeling produced by the rebellion, the large expenditure caused by the war has called forth hordes of greedy speculators, who have grown rich on the plunder of the people's money. The habit had been formed; the management of parties had already fallen into the hands of gamblers and traders in votes and offices, who have plied their business, all the more briskly, because the dangers that beset the country multiplied the opportunities of profit. Everything has long been bought and sold,—legislation for the benefit of corporations and cliques of capitalists; grants of public lands; official influence; even the ability to introduce applicants for jobs to those who give jobs.

This frightful venality rivals the abuse of Executive patronage, in its degrading and poisonous influence on the Govern-

ment, and on all classes of the community. The cause of these evils is not the ignorance of the people. Every one deplores them, wonders at them, yet cannot think of a remedy. The Government is below the mental and moral level, even of the masses. Go among them. Talk to the farmer in his field, the blacksmith at his anvil, the carpenter at his bench,—even the American laboring man who works for hire, in the Northern States,—and compare their conversation, so full of good sense and sound feeling, with the ignorance, vulgarity, personality and narrow partisan spirit of an ordinary Congressional debate, and with the disclosures made by investigating committees. Evidently the mind and moral sentiment of the people are not represented. Visit a rural hamlet. Put up your horse at the best inn, and find out, from the communicative landlord, who are the men in the neighborhood most respected for their intelligence, property, and probity,—whom people are glad to consult, and make their trustees, executors or guardians of children. You will be told that they are the owners of the well-cultivated farms, with their substantial barns and houses, you have just passed on the road,—of the comfortable mansions, surrounded by trim gardens, in the village itself. Then ask if these men are members of Congress or of the State Legislature, or if they are delegates to nominating conventions. The landlord will smile at your question. No, indeed. These men are not politicians. All business of that sort is managed for the county by Messrs. Quirk, Gammon and Snap, the attorneys,—smart, sharp, active men, who have risen from practising law to practising politics,—members of a profession which has a great deal to do with governing the country, and who sometimes carry with them, into public life, the ignorant prejudices, the narrow views, and also the habit of taking fees, acquired at the bar.

It is an obvious truth, that the affairs of a civilized and powerful nation must be managed, not by ignorance, but by knowledge,—not by folly, but by wisdom. The success of a

democratic Government depends wholly upon the general intelligence of the people. But what does it avail if that intelligence cannot be applied,—if, through some defect in the machinery of government, an irresponsible power, unknown to the law, be created, which rises up between the people and the public good, and, professing to represent the former, substitutes, for their convictions, sentiments and interests, its own plots and plans, petty aims, partisan hates and selfish private ends. The sum total of all the purposes of Government is to get good men into power. Have nominating conventions done this? Until the accidental selection of Mr. Lincoln, has not a generation grown up to manhood since we have had a President who could command the respect of any rational being? Were Buchanan, Pierce, Polk, Harrison, and Taylor, fair representatives of the American heart and intellect? Since Clay, Webster and Calhoun left Congress, how is it that eloquence and wisdom, knowledge and culture, have left it also, and that its debates, with few exceptions, have inspired nothing but loathing and contempt? Why is it that, plunged suddenly into a stormy sea of peril, one man only, in public station, and he a stranger, attracts the respect and confidence of the people, and that we open each day's report of the proceedings of Congress, not with hope, but with dread? Why is it that, not mediocrity of talents, morals, and attainments, but a lower level than mediocrity, is the rule of official station; and that now, as for many years past,—

> "It sounds like stories from the land of spirits,
> If any man obtain that which he merits,
> Or any merit that which he obtains?"

These evils are the work of nominating conventions, badly organized,—of a secret, silent, irresponsible power, born, indeed, of an inevitable necessity, but unknown to the Constitution and ungoverned by law, which has woven its network of invisible chains around the mind of the people till they cannot stir, except at its bidding. Nominating conventions and their nominees form, in fact, an association of affiliated societies, which has taken into its charge the government of parties, and

therefore of the nation. Under its fostering care the foul waters of corruption have inundated every department, avenue and crevice of our politics, and its reckless hand laid and fired the train which has exploded the passions of the people into a widespreading conflagration of war.

Carlyle has well said: "Given the men a people choose, the people itself, in its exact worth and worthlessness, is given. A heroic people chooses heroes and is happy; a valet or flunkey people chooses sham heroes, what are called quacks, and is not happy. The grand summary of a man's spiritual condition, what brings out all his herohood and insight, or all his flunkeyhood and horn-eyed dimness, is this question put to him, What man dost thou honor? What is thy ideal of a man or nearest that? So, too, of a people. . . . Nor are electoral methods, reform bills and such like, unimportant. A people's electoral methods are, in *the long run*, the express image of its electoral talent; tending and gravitating perpetually, irresistibly, to a conformity to that, and are at all stages very significant of the people."

The electoral method called nominating conventions, as at present constituted, is not the "express image" of the mind and character of the American people, fortunately for us and for the experiment of Democratic Government. They submit to it of necessity. Some electoral method they must have, and no wise man has yet appeared to suggest a better or to alter or improve the present. It has not offered to the people men whom they can honor, but has fallen far short of their ideal. So far from honoring the quacks and shams often presented to them by the conventions, the Government had, before the war, fallen into contempt. Confidence and respect have, for many years, been leaving it rapidly, and with them power. Nothing is more common than complaints of the action of the conventions. Parties are sometimes defeated because of the infamous character of the nominations. Thousands refuse to vote at all, unable to decide between degrees of incompetence and shades of guilt. At length, during the last administration, corruption and imbecility, ignorance and baseness, brought public affairs to such a pass that the party in power broke

down amid the universal derision and scorn of the people. The election of Mr. Lincoln was a protest of the revolted conscience of the country against the foul abuses of the Government. The war is another protest of a similar kind. The great uprising of the nation is a proof that the electoral machine has not worked well; that if it winnows the opinions of the people, it gives them not the grain but the chaff, and that some other machine is imperatively demanded to represent their intelligence and moral sentiment.

The present hour is full of signs and warnings for our instruction. It is a product of all the past, it contains the seeds of the future. It is for us to heed its monitions, to study its lessons, to answer its questions. Let us know one thing for certain, that our public and political life of the recent past is a dead carcass that poisons the air, and must be buried forever out of sight. Somehow or other the voice of the people must be permitted to sound and must be obeyed; their convictions and feelings must be expressed and must rule, or peace and union, order and liberty, cannot be restored and preserved. Abuse of Executive patronage, official venality, partisan alliance with slavery and the sway of demagogues must cease or we are lost. We have been called a prosperous and contented anarchy. But we are no longer prosperous and contented. We have made idols of cotton and corn, of negroes and cent per cent, and fallen down and worshipped them, and now we feel the vengeful arrows of the Lord.

Wealth is poverty and prosperity calamity, when the invisible and spiritual guides are no longer obeyed, for they alone lead to happiness and peace. "Be not deceived; God is not mocked; for whatsoever a man soweth that shall he also reap. He that soweth to the flesh shall of the flesh reap corruption." And what is corruption but death; death to the soul of a man, death to the honor, the glory, the power, the liberty and the true life of a nation. History records many such deaths. Our American society has been described as anarchy, *plus* the

street constable. Anarchy of opinion, of passion, of sections and parties we have long had for want of a true Government. We shall not long keep even the street constable, unless some means be speedily discovered to restore respect to the authority of the law, by making those who exercise it respectable.

What is democracy? Is it, according to the generally received opinion, the government of the laboring classes, and the disfranchisement of property and cultivated intelligence? If so, democracy is the government of a privileged order, and that the least fit to govern. Aristocracy or monarchy would be far better; oligarchy, or the government of mere wealth, could not be much worse. Acquired property is the symbol of energy, intelligence and active usefulness; knowledge is the highest attainment and distinction that man can reach; each, if not entitled to rule, has a right to a fair share of power over society; nor can they be excluded from it without destroying civilization.

The definition of democracy, therefore, as the tyranny of mere numbers, cannot be accepted by the American people. Though less immediately destructive here than in Europe, it would check our progress in all liberal pursuits, and in time undermine society by the eating canker of corruption. Property, if denied a representation, will protect itself by bribery, and the tribunes of the mere multitude would be tempted to seek office for the sake of illicit gain. Already the tendency to this degradation is clearly marked in our politics. The true idea of democracy, the only one consistent with liberty and civilization, is, that it is the government of society by the *whole* people; not by the rich or the poor, the learned or the ignorant; that all men, as men, have rights to be protected other than the rights of property or education, just pride to be gratified, and intelligence worthy to be exercised and consulted. Where the great body of a people are able to feel and appreciate these wants, that people is fit for democracy. To be governed by others implies inferiority; and inferiority,

where it exists, must be and ought to be so governed. All men have equal rights to justice, but even-handed justice will not bestow upon all men equal power, because those who cannot use it discreetly will abuse it to the injury of others, which is not justice. Intelligence only has a right to govern, because intelligence only can perceive truth, and truth rules by Divine right on earth and in heaven.

Find out in a State a class exclusively intelligent, and that class should have exclusive power. Find out a man supremely wise and good, and what can we do, as Aristotle says, but deliver ourselves up to him as his subjects and servants. Thence hero-worship. Such instinctive reverence have we for greatness and goodness, that when we see them manifested in a man, or only think we see them, we are eager to trust, honor and obey him. Thence also the Grecian ostracism, explained by Aristotle on the same principle. The best and wisest man is far from supreme in wisdom or goodness, therefore not to be trusted with absolute power; but an approximation to both, excites such lively admiration, as to be dangerous to liberty; and the Greeks could find nothing better to do with a great man than to banish him, to prevent him from becoming a tyrant. The difficulty is to find a class in which the intelligence worthy to govern resides. In Europe they know very well in what class it does not reside, and they cling to their monarchies and aristocracies. In our Southern States the people know that it does not reside in the negro race, and therefore they exclude it from power. But in the North, who can classify the people so as to distinguish between the ignorance and poverty that ought to obey and the knowledge and wealth that ought to govern? No such classification is possible. As already stated, property and education are so widely diffused, and every order of society participates so generally in both, that no dividing line can be drawn. Poverty and ignorance exist, undoubtedly, and perhaps may be considered as the permanent characteristics of some small sections of the people, but they are so small, that they may easily be controlled by the predominant intelligence of the rest, without invidious and dangerous distinctions, if the proper machinery,

the electoral methods, were provided to represent and execute the intelligent will of the community.

Nominating conventions have already been discussed as one of those methods, which have been grossly abused, indeed, in practice, though they, no doubt, have been productive of much good, and might be made efficient engines to place honesty and ability in power. They should be so constructed as to become well-chosen local committees, appointed by the people to do, what they cannot do, find out who in a district are fit to be trusted with official authority and to present them when found to the people.

Equal and universal suffrage is another electoral method employed to carry out the principles of democracy, generally mistaken for democracy itself, and indeed the cause of much of the dread which it inspires. Universal and *equal* suffrage does not fairly represent society and bring into action all the elements of its power. In Europe, where the masses are poor and ignorant, and, as a general rule, remain so from generation to generation, if each man had a vote the government would be thrown wholly into the hands of the most numerous class, and the just claims of education and property, to at least equality, would be denied. But inequality, not equality, is the law of nature, and differences of social position are the results and tokens of disparities of mind and character. Men are not equivalent in value one to another, and any Government which disregards natural differences and violates natural laws cannot succeed. It is manifestly absurd to give equal influence in public affairs to ignorance and knowledge, to vice and virtue, to pauperism and wealth, and a government that did so would be founded, not on truth, but on falsehood.

Universal suffrage, moreover, throws all power into the hands of a majority, or what, from the returns of an election, may appear to be a majority. The rights of a minority, however large, are disregarded, and for this reason the tyranny of a majority is justly dreaded as the vice of democracy. Where parties are nearly equal, a very small number holds the balance of power, and may decide questions of deep im-

portance; and that small number may be gained by terror or fraud, or may be apparent only because of false returns, or opinions may be imputed to a real majority which only a small portion of it entertain, all which have happened repeatedly in our practice. It is no reply to this to say that a defeated party can wait till the next election and will then have a chance to win the people to its side. In the interval injury irreparable may be done, and even the Government itself be attacked by rebellion, as our recent experience proves. The absolute, unchecked sway of a mere majority violates the principle of equal rights, which is the true principle of democracy. It is not the Government of the whole but of a part, for the voice of a part in the public councils is silenced for a time at least, and it may be at a critical period, big with the destiny of the nation.

These and other defects of universal and equal suffrage, as a means of expressing and carrying out the real opinions of the people with fairness to all interests and classes, have been pointed out in recent English writings on political science, more especially by Mr. John Stuart Mill, in his very able work on Representative Government. Various remedies have been suggested by which the dreaded dangers of approaching democracy in England may be averted, the consideration of which would be beyond the scope of this essay. Thinkers and scholars are, in that country, engaged earnestly in discovering and explaining the true principles of free government, so that inevitable changes may be gradual and the destructive shock of revolution be avoided.

Our Constitution fortunately presents no obstacle to improvements suggested by thought or experience, in reference to suffrage. The evils of the past prove that some alterations are necessary to enable the people really to govern. This war is an effort on the part of the people to make themselves heard and obeyed. It would never have happened had their wishes

been represented by the Government. They have risen in their might, and broken through party ties to shake off the abominable rule of demagogueism. The spirit and intelligence, the noble enthusiasm they have displayed, prove that power is safely lodged in their hands if they could find out how to apply it. But neither the power of the people nor of steam can be made available without an engine to regulate and direct it. We have invented admirable machines for steam power, but those yet contrived for popular power have been found worthless. They will not work, nay, they explode, scattering around them wounds and death. The difficulty is to get a machine that will do its work. Furnish one to the people, and they will be able to use it, but they cannot make one. Inventors are rare. Workmen who can manage the steam-engine, the telegraph, the cotton gin, the printing press are plenty enough, but these wonderful instruments were each the happy thought of a gifted mind, such as nature does not produce in crowds. The machine called a government, is a higher product of human wit than any of these. So high and difficult a work is it indeed, that not one man or set of men, however wise, but generations of the wisest are necessary to perfect it, by minute alterations and improvements, through ages of constant effort. Our fathers inherited the English Constitution, long tried and gradually perfected by thoughtful toil. With reverent care they preserved what they could of it. With anxious deliberation they altered it, and added to it, according to the imperative demands of new circumstances. But those sages were not infallible, nor did they pretend to be. They did not make their work a fetter upon the intellect of the future; on the contrary, they left it elastic, pliable, and open to amendments suggested by new wants and advancing knowledge. The pressing want now is, some electoral method to render universal suffrage consistent with equal rights, and to express the will and moral convictions of the people. The people cannot act directly. They must of necessity act indirectly. To supply this necessity nominating conventions have been adopted. But who is to nominate, who does nominate the members of these

conventions? Somebody must, for the people cannot. They, indeed, can scarcely be said to elect them. They are nominated by party leaders, who become leaders nobody knows how, and who have neither legal duties nor responsibilities. Either the whole system must be abolished or it must be reformed, so that capacity and integrity may preside over these conventions. The law cannot say who shall be members of them, but it may say who shall not be. It may require some qualifications that would be a guarantee of character, and prevent the disgraceful spectacle of members begging and receiving offices from their own nominees. The electoral colleges provided in the Constitution for the choice of a President afford suggestions, by which the conventions might be moulded into fit machines for drawing forth the intelligence and carrying into effect the wishes of the people. Ample power over the subject is conferred on Congress, by Section 4, Article 1, of the Constitution.

This war is a test of the Constitution, and will hardly pass away without introducing changes in our Government. Great moral forces have been stimulated to violent action, free scope has been given to the pent up, but long-brewing elements of strife, and when the wild uproar has subsided, we can scarcely expect the regular and normal movement of our system to be resumed. The restoration of the Union is still doubtful, notwithstanding the victorious progress of the Northern arms.* Our generals wherever they go proclaim peace, protection and friendship to the Southern people, and offer them their former position under the old flag. They are received with every manifestation of bitter hatred; the very women revile and spit upon them as they pass. Demonstrations of loyal sentiments have been as yet feeble and few. No doubt the opinions of many are repressed by the reign of terror established by the rebel government, and will become manifest when its power is

* May 31.

destroyed. Probably also the hopelessness of their cause and the obvious benefits of the Union, may bring back to it the reluctant oligarchy. But slavery will remain, unless destroyed by the war, and with it the spirit of caste and sectional interests. Is union possible with a people thus alienated and hostile? If with sullen reluctance they yield to necessity and return, will they not for many years be dangerous in peace, and more dangerous in war? Would they not bring back with them all the old feuds and hates, would they not sympathize with an enemy and welcome a foreign invader? Can we conquer them and hold them in subjection by military force? Would that be justice, would it be a real Union, would it not alter the character of our Government, and end in the overthrow of republican institutions? But shall we let them erect an independent nation in the South, and thus rob us of our Southern territory, with its coasts and ports and cotton and the Mississippi, and establish on our border an unfriendly power, ready at any moment to become formidable by European alliances? And what shall we do with slavery? Can we retain and protect it, in the Union, as before? Would it not again become a source of discord, an element of party power, and cause new rebellions and wars? Will it not do this either in or out of the Union? Should the present contest end in separation, where can the line be drawn? If slavery be included in the Northern section, then slavery would always be an element of danger, for it would always be really the ally, as it now is in the Border States, of our Southern enemies. If the line be drawn north of slavery, then the Southern Confederacy would become a formidable rival to the Northern. Is it possible immediately to abolish slavery consistently with justice and humanity, or at all? Is it possible to retain it, and at the same time satisfy Southern demands and Northern opinion? These and other problems the swift hours are bringing to test our prudence and firmness and wisdom. They are more difficult to dispose of than the war. They imply another question graver than any,—has the power to cope with such difficulties been provided in the Constitution? Can they be

dealt with by universal suffrage, nominating conventions and quadrennial Presidents? These have guided us into our troubles; will they guide us out of them?

It cannot be denied that the future is clouded by doubt. We have been for many years sowing the wind, and are now reaping the whirlwind. Not with impunity does a people hasten to be rich, and foolishly, Midas-like, pray that everything it touches may be turned into gold. On truth, justice and knowledge, not on cotton, corn and negroes, must the greatness and glory of a nation be founded. Spiritual causes work in silence and in secret, until at length they reveal themselves in startling and inexorable facts. "The feet of the avenging deities are shod with wool." We have filled our barns with plenty, and said, "Let us take our ease, eat, drink, and be merry;" when suddenly, a voice from heaven has cried, "Thou fool, this night thy soul shall be demanded of thee; then whose shall those things be which thou hast provided?" Whose indeed! Shall they belong to a nation once known as the United States, or be partitioned among several nations, or shall they become the prey of a foreign spoiler? "The mills of God grind slowly, but they grind to powder."

The punishment, as yet, has chiefly fallen where it was most merited, on the arrogant, overbearing, selfish, sordid and sectional South, slave-trading, slave-breeding, and worshippers of slavery and cotton. But many a Northern home has been clouded by grief, and a heavy load of taxation and debt has been imposed on the Northern people. As a compensation, however, their intelligence and force of character have been developed, their finest emotions have been touched, and they have shown that amid their busy industry, the divine fire of feeling and enthusiasm has not been extinguished in their hearts. The Northern people now know themselves better than they ever did before, their capacity, their strength and courage. They know that they can trust each other. They

know that they have a nation to preserve, and they are determined to preserve it if they can.

It will not be an easy task, and he is a bold man that ventures to predict that it will be accomplished. Our courage *is* screwed to the sticking-point, yet we may fail, and fail too in spite of victories on fields of battle. It needs no prophetic inspiration, however, to feel sure that this Northern people will, in the Union or out of it, continue to advance in wealth and power, in science and the arts of peace and war; that they will till, cultivate and adorn the vast and fertile regions they possess, and cover them with the works of aspiring civilization; that they will continue to be a free people, and under all changes of form, preserve the scope, the spirit and the action of Republican Government. They cannot do otherwise. These things are the outgrowths of their race, run in their blood, beat in their hearts, and form the texture of their thoughts. Our Constitution did not give us liberty, but the spirit of liberty, the Constitution. Freedom of speech, freedom of the press, freedom of worship, security of person and property are in it, and as defences of these, trial by jury, the writ of Habeas Corpus and representative Government. These were put into the Constitution, because they were already in the minds and hearts of those who made it. They have remained in the Constitution, because they have been cherished in the minds and hearts of those who have lived under it. Abolish the Constitution to-morrow and these principles would create another like it, if they remained in the thoughts of the people. Change the sentiments and character of the people, convert them into French Celts or Irish Celts or Russians or Sclavonians, and the Constitution would become a dead letter, without force or meaning. Forms are useful only as manifestations and instruments of the informing spirit. When that spirit dies, forms become the rubbish of the past. Among a progressive people, old ideas like old men, are always passing away, and new ideas rising with new generations. Thus all things change, but always we have both the old and the new, sober age clinging

to the past and restraining rash youth, too eagerly rushing on the future. So should it be in Government. New forms are not easily invented, even when necessary, to serve a growing and advancing people. We should therefore retain the old that have been tested by experience, as long as we can, modify them with caution to suit new conditions, and in interests so momentous as those that depend on the organic laws of Government, "Prove all things; hold fast to that which is good."

# APPENDIX.

*Note to Page* 284.

## THE PRESIDENT'S PROCLAMATION OF SEPTEMBER 22, 1862.

THE Proclamation issued by the President, September 22d, 1862, is the most memorable, and may prove the most important event of the war. It draws a clear line between the past and the present, and marks the progress of opinion. When the war began, slaves escaping to our lines were returned to their masters. Afterwards, with hesitation, they were received and employed as laborers, but our Generals who proposed to invite them to escape, or to arm them as soldiers in our cause, were disavowed and rebuked. This forbearance, however, produced no effect on the Southern people. Their vindictive hatred increased, and the rebellion waxed in strength. With it grew the determination of the North. At last, slowly, very slowly, men began to say: "Slavery was the cause of the war; why should we protect slavery? It gives strength to the rebels, who are endeavoring to destroy our country, who have filled our homes with mourning, and imposed on us a heavy burden of debt and losses; who have not hesitated to lay their hands on any Northern property they could find, to inflict on us every injury in their power. What is there in slavery so sacred or so beautiful, that it should be exempt from the laws or the fortunes of war? Slavery is protected by the Constitution indeed, but men who have cast off the Constitution, who defy it, who seek its overthrow, cannot surely claim its protection. The Southern people have attacked our Government. We are waging against

them a just and necessary war, the object of which is, by means of the destruction and suffering it causes, to conquer such a peace as may restore and secure our rights. Why then should we not avail ourselves of every means permitted by the laws of war, to weaken our enemies? Should slavery perish in the conflict, the world will not mourn its loss, and the Southern people will have brought it on themselves."

Gradually and with difficulty, the events of the war have brought Northern sentiment to this point. So kind were the feelings of the people towards the South, so profound their reverence for the Constitution, and so deeply rooted the idea, that as by it slavery was guaranteed, it should therefore be preserved. These opinions have been changed, and this Proclamation is the result. The President himself has been the subject of a similar change, as his whole course abundantly proves. A year ago, six months ago, he could not have proposed such a measure, and had he done so, it would have been received with general alarm and disapprobation. Now it seems to most men a natural and inevitable result of what has gone before.

It is, indeed, a very grave and serious matter, and so is the war, and so will be its consequences. We must prepare our minds to witness great events and great changes, for immense forces of a character to cause both have been set in motion. We should try to enlarge our vision so as to see the real dimensions of the things that surround us, which dwarf all our past experience. Attorney logic and Courthouse law do not suit the times we live in.

A President of the United States has issued a decree, that all the slaves in any State in rebellion to the Government on the first day of January next, shall be "thenceforth and forever free," and that the Executive will do no act to suppress "any efforts they may make for their actual freedom." Did any gifted seer behold this handwriting on the wall, when Northern and Southern Democrats combined their forces to impose the Lecompton Constitution on the people of Kansas?

The remarks in the text on emancipation as a war measure, to

which this note refers, were written in May last. It must be evident to every reader, that the argument there used does not apply now, so greatly has the position of affairs changed in the interval. Then, we were in a tide of victory. Since, we have suffered defeat. Washington has been seriously endangered, the Northern States invaded. The strength displayed by the South has been so great, that self-defence urges us to adopt measures, which before were considered unnecessary. Six months ago we still clung to the hope that a Union party existed in the South, and therefore that this war was really waged as at first intended, not against the people, but against a usurping faction, so that any measures destructive to the interests, or injurious to the feelings of the whole people, would have been at once unjust and impolitic. Now it appears that all classes in the South are zealous and united in supporting the rebellion. The war, therefore, has changed its aspect. It is no longer a contest between a rightful Government and a rebellious conspiracy, but has become necessarily in some respects, a foreign war between two contiguous nations. The management of the war must therefore change. We are entitled to all the rights of belligerents, else our hands are tied, whilst those of the enemy are free. The Southern people treat it as a foreign war. They have declared their independence, they have formed a government, they are seeking foreign alliances, they claim to be a nation; if they succeed, they will be a nation. Surely, therefore, they cannot complain if we treat them according to the position which they themselves assume, and employ against them every means justified by the laws of nations.

That these laws authorize the Proclamation, there can be no doubt. If we have a right to wage the war at all, we have a right to do anything, not contrary to the usages of civilization, to weaken the enemy; to seize property, public and private, to ravage and destroy towns and districts, provided always that such extreme measures be really necessary, and not executed in wanton cruelty or revenge.* War is a stern and terrible remedy. It operates by means of destruction;

* Vattel's Law of Nations, chaps. viii and ix.

destruction of life, of wealth, of human happiness. The moral responsibility for the suffering it creates, is upon those who unjustly wage it, and the burden is heavy.

If the negroes are to be regarded as property used by the enemy in their military operations, property which gives them strength to carry on the war, no argument is necessary to prove that we have a right to seize and appropriate it to our own use, as much as if it consisted of artillery or ammunition. If the negroes are to be considered as men, as inhabitants of the country invaded, favorable to our cause, and willing to assist us, there can be as little doubt that we may invite their assistance, and reward them for it by pay and by freedom. Indeed, it would be monstrous to accept their services, and then return them to slavery. It would be folly not to accept their services, not to obtain their aid, by every inducement we can offer. Hitherto we have abstained from this, and why? Because we desired to protect slavery, which has, in fact, been living under our protection ever since the war began. We wished to protect it, because we thought we were making war on a conspiracy, and not upon a people; because we hoped to bring back that people to the Union, with all their rights, and with as little injury to their interests as possible. But the whole people have been swept into the ranks of the rebellion, and have forced us to make a foreign war. Nay, they have proved strong enough to invade us, to plunder our farms and villages. Are we not, therefore, entitled to all the rights of belligerents? Shall we fight with foils, whilst they use sharpened swords? Negroes form the strength of the rebellion. They do much of the hard work and drudgery of war. By their labors on farms and plantations, they enable the South to send its whole white population to the field. The negroes are our friends, would gladly be our allies. They think that we come as their friends, their liberators. Their masters have told them so, though hitherto we have not. On the contrary, we have told them that they had no interest in this war. "Not for your sakes is it waged," we said to them, "but for our own, and however it may terminate, you are to be slaves as before."

The Southern people have driven us out of this position. It has become absurd and ridiculous. Not until it became so, did we abandon it, and then with reluctance. The Southern people cannot expect us to treat them, at the same time, as friends and as enemies, as fellow-citizens and as aliens. They have assumed the character of aliens and of enemies, and must accept all its consequences. They have confiscated every dollar of Northern property they could find. Why should not we do the same thing with Southern property, more especially if it be contraband of war? We are sending to the field thousands of the best and noblest of our youth. Why should we not employ, at least in the labors of the camp, those inhabitants of the South who are willing to serve us? Did there exist in the North, a class of men who sympathized with the rebellion, who were hostile to the Government, and ready to rise in arms to join the ranks of an invading army, would the rebels hesitate about appealing to them and asking their aid? Have they not used Indians in this war? Are they not endeavoring to gain the assistance of France and England? If we wish to succeed we must use the negroes. Our fathers did so in the War of Independence. The State of New York, in 1781, gave freedom to all slaves who should serve in the American army; and, in 1786, passed an act by which all slaves were set free who had become public property by attainder, or the confiscation of their master's estates.*

All the negroes we employ, we must, of course, set free. If we wish to obtain their services, we must tell them they will be free, that they are free in the eye of this Government, which will no longer recognize their slavery or use any means to enforce it, provided their services shall be required. This is what the President says, and further than this, as commander of the army and navy, he could not go. Even in going thus far, he does not depart from the original design and plan of the war. He does not treat the South as a foreign nation except in a military sense. He offers peace; he offers restitution of

* 2 Kent's Commentaries, 206.

all rights. "Come back," he says, "to the Union, and take your former place in it, with all its privileges and powers, even the power of again governing us, if you can. Send your representatives to Congress. If you do that before the first of January, this edict will be of no effect."

When the President declared that after the first of January the slaves in States who had not then sent representatives to Congress should be free, he at the same time declared impliedly that he would do nothing to keep them in slavery. He has thought fit to say so expressly, probably because, on a former occasion, he avowed his determination to put down any attempt at insurrection. After the first of January he will leave that task to the Southern people. Willingly he will leave it to them, together with the task of resisting our armies; and if they should find the former the more difficult business of the two, so much the better for us. The President has been charged with an attempt to excite a servile insurrection by this part of the Proclamation. The Southern people are of course indignant at it, and the Northern party, who favor the South, are equally indignant.

The policy executed by the Proclamation has indeed been very generally opposed by the generous and humane sentiment of the Northern people, because they feared it might spread throughout the South the horrors of a servile war. The sentiment is a just one. We do not war on women and children, on the weak and defenceless. The massacres of St. Domingo are yet fresh in the world's memory. We have no wish to see them repeated at the South, and to let loose upon gentleness, beauty, innocence and refinement, the untamed, brute ferocity of barbarians.

Is such the design of the President? He does not say so. His whole previous conduct proves the contrary. Slavery is, at the same time, a source of weakness and of strength; of weakness, because in war there is always danger of insurrection; of strength, because so long as the negroes are obedient, they may be employed both in peaceful and warlike labors. We have suffered from the vigor and efficiency which slavery has imparted to the Southern armies. Confi-

dent in our superior power, hoping always for a display of loyal feeling among the Southern people, we have been content to suffer, rather than run the risk of causing a desolation, greater even than that of war, among our countrymen and brothers.

But events have changed our position in relation to this as to other points already mentioned. We find it no easy task to conquer the rebellion, now that it is sustained by the whole Southern population, white and black. When Mr. Lincoln undertook it, he called for seventy-five thousand men. He has now nearly a million, yet he has been scarcely able to defend Washington, and not able to defend the Northern States from predatory invasion. So much power has the South, derived chiefly from slavery, that it has become evident that unless we can speedily put an end to the war, we may have a foreign war also on our hands; for the nations of Europe, demanding cotton, demanding the restoration of commerce to its old channels, cannot be expected to wait forever on our tardy operations. What then shall we do? Suffer ourselves to be conquered by slavery in war as before we were in peace? Or having felt the strength of slavery, shall we make the South feel its weakness? By means of the strength imparted by slavery, the South wins battles and protracts the war. Clearly, then, we are justified in destroying slavery, if we can, as a mere military measure, as much as we are in destroying forts and navy yards.

This is what Mr. Lincoln proposes to do. He has declared that after the first of January he will recognize no such thing as slavery in the rebellious South; that if the slaves rise to assert their freedom he will not help to put them down. Why should he? The laws of war do not require it of him; no principles upon which it is possible to conduct war require it. He does not say he will send emissaries among the negroes to instigate them to revolt; that he will arm them for the work of lawless havoc; that he will stir them up to massacre and plunder. But he does say to the Southern people: "These negroes have been heretofore to you a source of strength by reason of my forbearance. Naturally they are a source of weakness. I give

you notice that henceforward I will treat them not as slaves, but as freemen. That wherever I can, I will set them free and employ them for my purposes, as you have employed them for yours. If they attempt to gain their liberty, I shall not interfere to prevent it. That is your business, not mine. If you dread them, call home your armies from Tennessee and the Potomac to guard them. Your troops will be employed in such duty, more to my satisfaction, than they have been in threatening Washington or invading Pennsylvania."

But the tendency of such a Proclamation, it may be said, is to excite insurrection. Of course it is, and so is the tendency of the war. No State founded on slavery can engage in war without the risk of a servile revolt. That is one of the evils of slavery. But does it follow from this, that when such a State is at war, its enemy is obliged to keep its slaves in subjection? On the contrary, may not that enemy justifiably proclaim liberty to the slaves, and leave to their masters the task of holding them in bondage, for the very reason that this duty will embarrass the military operations of those masters, diminish their forces, fill them with terror and thus expose them to defeat? And should an insurrection ensue, who is responsible? Surely not the military chief who issued the Proclamation according to the laws of war, any more than he is responsible for the misery and death to the innocent, caused by the falling of bombshells into a city that refuses to surrender. His duty is to take the city. The duty of the other side is to defend it or to give it up. One of two things the Southern people must do hereafter. Put an end to the war by submission to their lawful Government, or themselves keep their negroes in subjection. These, heretofore, have shown no disposition to revolt. The whole South is armed and vigilant. A general insurrection is almost impossible. The negroes are ignorant, unarmed, incapable of combination, accustomed to obey and closely watched. The slightest manifestation of a disposition to rise, would be punished with terrible severity. Mr. Lincoln's Proclamation is far more dangerous, in this point of view, to the blacks than to the whites. It is not likely to cause an insurrection, but it may excite the dread of one, and thus

weaken the military power of the South. It is a military measure intended to produce that effect. It is a military measure put off as long as possible, in the hope that events might render it unnecessary. It became necessary to save us from invasion, from foreign intervention and perhaps from foreign war.

Let it be granted, however, for the sake of argument, that the danger of an insurrection, excited by this act of the President, is serious,—that it is even unavoidable. It surely cannot be pretended that Mr. Lincoln means or desires to cause such a result, when he gives ample notice of the intended measure, and at the same time opens a path by which its dreaded consequences may be avoided. The shelling of a city is a terrible act of war. It necessarily involves the destruction of a vast amount of property, and also of lives, which even war spares if it can. The practice, therefore, of civilized warfare is, first to demand a surrender of the city, and if that be refused, to give time for the removal of women and children, and other non-combatants, before the dread alternative is executed. Mr. Lincoln has given three months' notice of his purpose, during which the Southern people can prepare themselves against a servile revolt. They have prevented one so far, in the midst of a war, the object of which, the negroes believe, is to set them free. It is scarcely probable that Mr. Lincoln's paper proclamation will have such an effect on their minds that the authorities of the South, forewarned as they are, cannot prevent the horrors of an insurrection. If they continue, indeed, to send forward to the battle-fields of the war their whole available white population, the negroes might become dangerous, should Mr. Lincoln, on the first of January, tell them they are free. But let Mr. Davis detail as a home-guard some of the able generals, such as Lee, Joseph Johnston, Beauregard, Stonewall Jackson, and others, and say two hundred thousand of the brave troops that have given us so much trouble, and there could be no danger. Is it a crime to force him to do this? Or is it contrary to the laws of war? Mr. Lincoln's Proclamation has been likened to the barbarous practice of poisoning wells and springs. But suppose it became necessary, in

a campaign, to prevent the occupation of a particular region which could not be defended, and the general in command gave explicit and ample notice to the enemy that the springs and wells were poisoned. Without admitting any analogy between the cases, would not such notice take away the barbarism of the act, so far as the enemy was concerned? Had Mr. Lincoln intended to cause a servile insurrection, he would not have given three months' notice of his design. That the Proclamation may, if it can be carried into effect, break up the fabric of Southern society, destroy a large amount of slave property, derange the industry, and inflict heavy losses on the Southern people, is no doubt true. But such injuries are within the legitimate scope of war.

The President has not only given ample notice of his purpose, but he has offered honorable terms by which its dreaded effects may be avoided. He demands no mortifying submission, no payment of the heavy expense of the war, no security for the future. All he asks is, that they shall send representatives to Congress, whose votes may perhaps control him; that they shall resume their place in that Government, by whose Constitution, he himself is bound to put down insurrection; under which Government their slaves have risen from $200 to $1000 each in value; under which they enjoyed, for nearly a century, peace and security, and made such progress as Africa permitted them to make. Not very hard conditions, one would think, to be offered to men who are attempting to overthrow a Government which conferred on them so many benefits, and who have inflicted on its people so many injuries.

There is another way, not suggested by the President, by which the South may, now and forever, avoid all danger from insurrection, and make the negroes perfectly safe,—convert them perhaps into zealous co-workers in the war. The Southern people might be beforehand with Mr. Lincoln, and themselves give freedom to the slaves. This plan, indeed, would not please the ruling classes in the South. The two billions would rise up in all their majesty to forbid it. But necessity is a hard master. If they have to choose between the two,

the way proposed is better than insurrection; it is better than to have the negroes freed by Mr. Lincoln. If the destruction of slavery be inevitable, and it looks so now, would it not be wise to yield to the inevitable, and thus control it, by doing themselves, in their own way, and with such precautions as their experience may suggest, what otherwise will probably be done for them, not in their own way?

By this course they would gain many solid advantages, whilst the loss would be apparent only. The two billions are rapidly becoming ideal,—melting away indeed, like a bank of snow before the glances of the sun. The negroes have become already demoralized, and will become still more so when the President's decree, on the first of January, is fulmined over the South. It may well be doubted whether they will ever again be contented in their former condition. Why not make a virtue of necessity, and set them free at once? By this means the South would satisfy the opinion of the age, and very probably secure immediate recognition from Europe. The leaders of the rebellion would indeed lose the friendship of the Democratic party in the North, but the Southern people would immediately create another party in their favor, as respectable, and more powerful. Such an act would effectually take the wind out of Mr. Lincoln's sails, and do more to weaken his armies than he can do, either by his Proclamation or by victory, to weaken theirs. Let the Southern people convert the slaves into a free peasantry, or a servile caste,—let them take out of their code, out of their manners, out of their hearts, the lie that men are property, which is destroying them, and which disgraces our Constitution, and put in its place the radiant truth of justice, and the muskets of our soldiers would drop from their hands, the rifled cannon refuse to roar. That lie broke the Union. Truth would make another and a better. Demagogues, democrats, traitors, rebel leaders and conspirators, would be swept away by a rushing tide of patriotic joy, and the people, North and South, would forget the war, forget its losses, forget its tears, forget its graves, forgive its injuries, and spontaneously unite together to celebrate, with loud acclaim, the birth of a new nation.

But we are not permitted to hope for a result so fortunate. If we may judge from the temper displayed by the Southern people, they will neither send representatives to Congress, nor themselves abolish slavery, before the first of January. The war must therefore continue, and it must be carried on according to the laws of war. These apply equally to civil and foreign war. They have nothing to do with the wrongs or the rights involved in the contest, but regard simply the fact of war. These laws, the result of the world's experience, are so just and true that they enforce obedience by the difficulties that arise when they are not obeyed. The mistake we made in the beginning was, a refusal to acknowledge the rebellious States as belligerents, from an unfounded fear that we should thus recognize their independence, or the justice of their cause. But the laws of war soon forced us out of that position. We soon found that we could not treat their privateers as pirates, or their captured soldiers as traitors; that we could not refuse to exchange prisoners, or grant parole to their officers, and receive flags of truce. "When a nation," says Vattel, "becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war betwixt the two parties in every respect is the same with that in a public war, between two different nations. . . . . Thus there are two bodies, pretending to be absolutely independent, who, having no judge, decide the quarrel by arms, like two different nations. The obligation of observing the common laws of war is therefore absolute, indispensable to both parties, and the same which the law of nature obliges all nations to observe between state and state."*

If the laws of war impose restrictions, they also confer privileges, and both are necessary to attain the ends of war. We have been obliged to submit to the restrictions, and now, at length, we have been obliged reluctantly to claim the privileges. These privileges permit us to weaken the enemy by any means not prohibited by the

* Vattel's Law of Nations, book iii, chap. xviii.

usage of civilized States. I have endeavored to show that to confiscate slaves as property, or to obtain the services of any of the inhabitants of an invaded country, favorable to our cause, is not a departure from the rules of civilized warfare, even though such a course may have a tendency to excite a servile insurrection. That the dread of insurrection, if it may cause a diversion of the forces of the enemy, is an additional and legitimate inducement to inspire that dread; and that the incidental and possible effect of a measure, which the enemy has the means of avoiding, cannot be charged against the President as its intended effect,—more especially when he gives notice beforehand of his purpose.

If this reasoning be correct, the Proclamation of the President is fully justified by the laws of war. Now, the laws of war are part of the law of nations, and the law of nations is, like the Constitution, the supreme law of the land, in this as in every civilized country.* If, therefore, the Constitution authorizes war to quell a rebellion, or to preserve the Union, it does not merely authorize, but commands the war to be conducted according to the law of nations. The President is the person appointed to conduct the war. He is the Commander-in-chief of the army and navy, and has as much right to issue this Proclamation, as he has to exchange prisoners, to capture a town, or to bombard a fort.

But it is said the President has exceeded his Executive authority, and exercised Legislative power, forbidden by the Constitution even to the Legislature. He has set free, or will set free, the slaves, in some of the States. This objection shows a strange confusion of ideas. We have been so long accustomed to regard the South as part of our country, that we cannot even think of any portion of it as for a time separate. The President has not proposed, in this Proclamation, to liberate a single slave in any one of the United States. Those in rebellion are not united to the others, but disunited,—certainly for a time, perhaps forever. We must treat them according to

* 1 Kent's Commentaries, chap. i.

the fact. They cannot claim the privilege of being in and out of the Union at the same time, or the protection of laws which they refuse to obey.

The theory of the Government, indeed, is, that the Union is legally unbroken, because it has not been legally dissolved; and the Government, therefore, claims the right to restore its authority over all its territory. It would be a strange thing if that necessary theory could be converted into the means of defeating its own objects and consequences. The Proclamation does not affect a single State in the Union. It declares, to the rebellious States, that its operations shall not affect any one of them that chooses to re-enter the Union; but so long as they are in fact, though not in law, out of it,—so long as they make war upon it,—they are enemies, subject to the laws of war. The Proclamation, therefore, is strictly a military measure, applicable only to public enemies in time of war, and does not touch the question of slavery under the Constitution in any State subject to its authority and entitled to its protection.

The Proclamation may nevertheless give rise to difficult and embarrassing constitutional questions. It is strictly an Executive measure. But Congress may not approve it. What power has Congress over it?

Such a question cannot arise in England. The King or Queen is Commander-in-chief of the army and navy. The Ministers, therefore, conduct a war as the President does with us. They are members of Parliament,—are, in fact, a committee of Parliament for the transaction of Executive business, and retain office only during the pleasure of Parliament. The important measures of war, therefore, are under the control of Parliament.

What is the power,—what, indeed, is the duty,—of the President, in reference to this point? Nobody knows. It is one of those questions which must arise under a written Constitution, and which time

and events only can determine. Like Congress, the President is elected by the people. He is therefore responsible, not to Congress, but to the people. His salary, unlike that of an English monarch, is beyond the reach of Congress. He holds office during his term, whether his measures be approved by Congress or not. According to some, the Executive is a co-ordinate and coequal branch of the Government. It is therefore independent of the Legislature,—may pursue its own separate course of action in its own sphere, without regard to the Legislature,—may interpret the Constitution according to its own convictions; so that Executive, Legislature and Judiciary may pull three different ways. All are equal, and each is supreme. So says Mr. Bates, the Attorney-General, and he is not alone in this opinion. Even the Federalist claims it as a merit that the President is independent of Congress.*

These topics have been already discussed in this volume, and I refer to them here merely to show that the President's Proclamation may prove one of those cases which make the present war a trial of the Constitution. The natural position of Executive power is that of subordination to Legislative, in a representative Government. The law-making is necessarily superior to the law-executing power, and a Government in which each branch is coequal and co-ordinate with the others is an impossible Government. In an important crisis, should there be a difference of opinion, either all action must cease, or the stronger must prevail, or a third power, stronger than either, will come in and gain the ascendency. As the Judiciary has no political power, the contest must be between the Legislature and the Executive. There is only one thing which ever has or ever can give to the Executive ascendency over the Legislature, and that is an army.

In the struggle between Charles I and Parliament, the latter triumphed, and the liberties of England were saved, because the King could not get an army. He had his Star Chamber, he had the power

* Federalist, No. 71.

of discretionary arrest and imprisonment, but he could not get money to pay troops without the consent of Parliament. Parliament could raise an army for itself, and proved, therefore, too strong for the King. But that army had a General, and it soon became an instrument in his hands. With it he turned Parliament out of doors, and reigned in England, so wisely and well, that his son succeeded him as quietly as Victoria succeeded William IV. But Cromwell could not bequeath his genius to his son, and therefore not the command of the army. The army, without a leader, could not govern; and the free spirit of the English people, which had endured Cromwell because of the moderation, wisdom and justice of his rule, and because of the veteran bands who obeyed him, rose against the tyranny of mere military Government,—the Government of soldiers without a leader, or with several rival leaders. The people longed for a Parliament and for the old monarchy, and gladly welcomed even the profligate and frivolous son of the perfidious and selfish King whom they had dethroned and beheaded. A Parliament again sat in England, and took care to deprive the King, by the Habeas Corpus Act, of a formidable instrument of power, freely employed under the reign of his father. But another revolution was necessary, before the triumph of Parliament and of liberty was complete. Fortunately, the base blood of the Stuarts remained long enough on the throne to bring this revolution about. In the reign of William III, the substantial power of the English Throne was transferred to a Ministry, responsible to Parliament and virtually removable by Parliament, with enough of authority left in the Crown to render it a conservative element in the Government, and the permanent representative of the nation.

As before stated in this work, we have no such element or representative in our system. In his authority and functions, the President resembles an English Ministry. Like them he represents a party, but, unlike them, when his party goes out of power he does not. He remains, the representative of a minority in Congress, of a minority, or perhaps of a majority, of the people. What, then, ought

he to do,—what can he do,—in case of a difference of opinion between himself and Congress, supposing him to be an honorable man, and influenced by pure and noble motives? He cannot well resign, as an English Ministry does in a similar case. That is not the intention of the Constitution, which he is bound to obey. One of two courses only is left to him. He must either abandon his own convictions, and the principles of the party who trusted him, and become the mere instrument of Congress to carry out measures which violate alike his own opinions and the opinions of his party, or he must resist the Legislature, and exert what power he possesses to oppose and defeat its will.

This is a false position. It is a dangerous and tempting one to an ambitious man; it is trying and painful to an honest man. It is the result of the fatal error of attempting to make things equal which, by nature, are unequal. So long as the Legislature keeps strictly within its sphere of making laws, the duty of the President is clear enough. He can veto a bill that he does not approve. If it be passed by the constitutional majority over his veto, his responsibility ends, because his power ends. But in his own Executive sphere he still has power, whatever may be the opinions and wishes either of the Legislature or of the people, and with that power is inseparably coupled duty and responsibility. Now, what is the power of Congress over the Executive sphere of the President? Of course Congress cannot perform Executive duties; but can it, like an English Parliament, direct the President how he shall perform them? If it cannot, then a case may arise when the liberties of this nation will depend on the personal character of the President.

Perhaps the case has already arisen. This war has already shown the absurdity of a Government of limited powers. It has shown that the power of every Government is and must be unlimited, for reasons already explained in this volume. But the word "Government" does not mean one branch of it; it means the Legislature and the Executive,—the latter acting in subordination to the former. Equality is out of the question. One of the two must be supreme. The supre-

macy of the Legislature means liberty, because the Legislature represents the whole people, receives constantly renewed expressions of their will, and is open to debate. The supremacy of the Executive means despotism, because it represents a party,—because its deliberations are secret,—because it acts with the vigor of unity. But in a free Government it is impossible for the Executive to become supreme, unless it be invested with power above the law over individuals, and also with physical force,—with military power. Let us see what the war has already done for us in this respect.

Next to an army, there is no more efficient engine of tyranny than the power of arbitrary imprisonment,—of silencing the tongue and the pen of the earnest, the bold, and the patriotic, by suddenly and secretly, without a hearing and without appeal, sending them where they cannot be heard,—where they cannot speak the truth to the people, and expose the iniquities of authority. This dangerous power, which an English Parliament wrested from the grasp of their Kings, an American Congress, or, as some say, the American Constitution, has conferred upon the President.

The right to personal liberty, like every other right, must give way to the public safety. The object of Government is to protect rights; rights, therefore, cannot be permitted to overthrow the Government. The summary arrest and imprisonment, when the nation or its institutions are attacked, of persons guilty or suspected of seditious practices or designs, without the delay and publicity of legal proceedings, may become absolutely necessary or highly expedient. Every Government must possess this power to protect itself. An arrest is an Executive act; and as the plea of necessity frequently has been and always may be used to cover ambitious and tyrannical designs, the English Parliament, after a long struggle, secured to itself the power of judging when the public safety requires a suspension of personal liberty. To decide upon that is a Legislative act, as much as it is to decide when it is necessary to raise an army to defend the public safety. Both these questions are therefore under the control of Parliament, whose action is necessary to organize and support the army,

and to suspend the privileges of the writ of Habeas Corpus. Should sudden danger arise during the recess of Parliament, the Ministry exercise all its power, as of necessity they must, for they are the only branch of the Government capable of acting. What they do, however, is subject to the judgment of Parliament, and when approved becomes virtually its decision. Should a summary arrest be necessary during the absence of Parliament, or even whilst it is in session, if publicity would prevent the arrest, the Minister does not hesitate to make it; but he immediately applies to Parliament for a bill to ratify his conduct, and also, should the danger continue, for a suspension of the Habeas Corpus Act. It is then for the Legislature to judge of the necessity for such a measure, and to impose such restrictions as to time and place, and modes of procedure, as it may deem necessary. In England, therefore, even in the midst of rebellion or invasion, personal liberty is under the care of the representatives of the people. No man can be imprisoned, without a hearing and a trial, but by their consent; and what, in certain junctures, may be more important, no one of those representatives can be imprisoned by any authority known to the law, without the consent of a majority of them, which was far from being the case before the revolution that secured English liberty from the grasp of Executive power.

When the rebellion broke out, the President, during the recess of Congress, caused several persons to be arrested and imprisoned, who were suspected of treasonable designs, just as an English minister does on similar occasions. According to the English practice, also, as soon as Congress met, the President told them what he had done, and asked them to ratify his acts. But Congress was silent. It passed no bill either to approve or to censure the act of the President. Two things are necessarily implied in the silence of Congress. First, approbation of his conduct, for if they did not approve, it was their duty to censure it, to protest against it. Secondly, want of power over the subject, for if they had the power it was their duty to exercise it.

I have already discussed this point in the Third Chapter, and refer to it again in order to show that Congress, whether constitutionally

or not, is not now the question, has conferred upon the President the power of discretionary imprisonment, and withdrawn from personal liberty, for an indefinite period and over the whole country, the guards provided for it by law. That this was necessary, that the rectitude of Mr. Lincoln renders it safe, do not alter the nature of the fact, which concerns the future as well as the present, that at the first serious trial of our Constitution, and in the first month of that trial, no man could tell what protection the law afforded to personal liberty, and that now, eighteen months after that trial began, the question is as doubtful as ever. The law was unsettled, and Congress refused to settle it, though requested to do so by the President. He has, therefore, rightly continued to exercise the power, but whether by virtue of the implied consent of Congress or because of his exclusive right, no one knows. Arrests are made every day, and forts are filled with state prisoners. The people are satisfied, because they comprehend the necessity of the case, because they have confidence in Mr. Lincoln, and because, notwithstanding some cases of hardship, unavoidable perhaps, the power has been exercised with moderation and justice, and without the slightest taint of personal motive or partisan feeling. All this is true, and yet it is also true, that this war, notwithstanding the boasted freedom of our Constitution and because of its principles and structure, has conferred on the Executive branch of the Government, absolute and irresponsible power over the liberty of the citizen.

The war has also given to the Executive an army. The conspirators against the Union managed their affairs with skill. They chose for the execution of their plot a moment when the Government had been weakened by their own leaders who were in office under it, when an old President was going out and a new one coming in. Mr. Lincoln, in the midst of novel circumstances, inexperienced in the labors of his office, surrounded by covert enemies and a disaffected people, found himself suddenly, also, in the midst of civil war. Here, also, he followed English precedent. He took the responsibility of calling out troops, of enlarging the army and navy, trusting that Con-

gress would sustain him and furnish the needful supplies. In this case there was no doubt about the law. Congress, like Parliament, alone had authority to enlist and pay an army, and was obliged to act. As a majority of Congress thought it constitutional to make war to sustain the authority of the Government and to preserve the Union, they expressly ratified the acts of the President in this respect, and gave him liberally both men and money. They thus settled the law, so far as this precedent can settle it, on one importat point,—that in the recess of Congress, when the public safety requires it, the President may enlist troops, as the agent of Congress, and subject to their approval. Had they been equally explicit in reference to the law of Habeas Corpus, much mischief would have been prevented.

The rebellion grew in strength. More and more troops were required until the number has swelled, it is said, to nearly a million. The war has thus conferred upon the Executive an immense army. The war has lasted eighteen months. The Constitution is a little more than seventy years old. Already under the Constitution and because of a civil war, a President of the United States finds himself invested with the command of a million of armed men and with absolute, discretionary and irresponsible power over the personal liberty of every citizen, members of Congress included. It is in vain to deny it. However right, however necessary this result may be, it *is* a result, it is an accomplished fact, and one too of no small significance.

Has it then, indeed, already come to this? Has Democracy so soon done its work and erected a military despotism on the ruins of our model republic? Not yet. Mr. Lincoln is no despot, nor has he evinced any desire to become one. Neither has he the power. He is, indeed, nominally in command of a large military force, but not of an army, in the European sense,—of a machine, blindly obedient, without thought or will of its own. He is surrounded by a number of his fellow-citizens, acting for the time as soldiers, who have voluntarily come forward to help him save their country. If they suspected him of any design against the liberties of their country, they would as willingly point their guns at him as at the enemy. But

these facts have nothing to do with an argument intended to show that by virtue of the Constitution such a state of things has come to pass. They prove, indeed, that under that Constitution, the liberties of the people may depend on the temper of an army and on the personal qualities of its chief. If the charges made against the Administration by its Northern and Southern enemies were true; if Mr. Lincoln was a fanatic and reckless partisan; if the whole object of the war was the abolition of slavery; if the masses of the Northern people were Abolitionists, and the "Yankee hordes" invading the South, no better than "nigger stealers" and "incendiarists," then, indeed, the danger would be serious. A fanatic at the head of a million of fanatics, a John Brown leading an army of John Browns, and invested with the legal power of discretionary imprisonment, would be irresistible. So, too, there would be danger if the chief of this army was a "military hero," a Cæsar, a Bonaparte, or even a Jackson. A Constitution should provide against dangers which, from the nature of man, are likely to occur. It is intended to meet the storms of the future and cannot count on always having a patriotic army and a patriotic President.

Even these are not always a security. Oliver Cromwell was an honest man. The vulgar slander that he was an impostor, a criminal usurper influenced by personal ambition, has been long since disproved. He was inspired by a lofty religious and political enthusiasm. Educated in a humble station, he joined the party who resisted a tyrant. His genius soon made him conspicuous, soon placed him in command of an army. That army was distinguished not merely by courage and discipline, but by intelligence, by high moral tone, and by an earnest and passionate devotion to an idea, a cause, unsurpassed by the soldiers of the Cross in the first fervor of the Crusades or the fiery horsemen of Mahomet. It is thus described by Macaulay: "The ranks were composed of persons superior in education and station to the multitude. These persons, sober, moral, diligent, and accustomed to reflect, had been induced to take up arms, not by the pressure of want, not by the love of novelty and license, not by the arts of recruit-

ing officers, but by religious and political zeal, mingled with the desire of distinction and promotion. The boast of the soldiers was, that they had not been forced into the service, nor had enlisted chiefly for the sake of lucre; that they were no janizaries, but freeborn Englishmen, who had of their own accord, put their lives in jeopardy for the religion and liberty of England, and whose right and duty it was to *watch over the welfare of the nation they had saved.*"*

This army had purposes of its own. It was determined to establish a republic. It was determined to put to death the tyrannical and perfidious king, openly, before the eyes of the world. It had been the army of the Long Parliament, and none wiser or more patriotic had ever sat in England, but the purposes of the army were approved neither by Parliament nor by the nation. The army, however, had become the master of both, and closed the doors of Parliament by force.

After the death of the King, the Government was without a person to represent Executive power. Naturally the place fell to Cromwell. No one else could occupy it. No one else could control the army. No one else could save the nation from anarchy. Authority, with all its responsibilities and duties, was thus thrust upon him. He could not refuse it. When he accepted it he was obliged to maintain his authority. He could command the army only by guiding and regulating, not by resisting its desires. The army would not submit to the dictation of Parliament, and Parliament would not submit to the control of the army. Such a dispute could have but one issue. "Cromwell filled the house with armed men. The Speaker was pulled from his chair, the mace taken from the table, the room cleared and the door locked. The nation, which loved neither of the contending parties, but which was forced in its own despite to respect the capacity and resolution of the general, looked on with patience, if not with complacency."†

For twelve years after this, the Government of England was a mili-

* 1 Macaulay's History of England, 112.

† 1 Macaulay's England, 123.

tary despotism. But such a Government does not suit the Saxon race. Whilst the despot lived they endured it, because of the advantages it brought. When he died they got rid of it. The proposal for a free Parliament, for an omnipotent Parliament, instead of an omnipotent dictator, was welcomed with universal joy. The Constitution was in a transition state, and the stern rule of Cromwell was necessary at the crisis of its fate. But for him the King would have been recalled, and would have brought back his extravagant claims of power, the haughty arrogance of his party, all the old issues and old quarrels. The axe that severed his head from his shoulders, severed also from the Government some of the false principles and abuses of the past and opened the way for another revolution which was destined to establish the Constitution on a firm and durable basis. This second revolution was made, not by a military dictator, but by a free Parliament, a Parliament, not of limited and enumerated powers, but "omnipotent" over the nation and the Constitution, because it represented the people. Since that time England has been in no danger of military dictation. She has had armies and wars and heroes and glory, but the armies, the wars and the heroes, have been under the control of ministers responsible to Parliament. No Marlborough or Wellington, however much the idol of the army or of the nation, has even dreamt of usurping political power. England gives to her successful soldiers honors and titles, parks and palaces, but does not give them crowns and sceptres.

Is our Constitution in a transition state? And must we, before it can be settled, pass through the sharp ordeal of military rule? The aspect of affairs is not hopeful, not because Mr. Lincoln has control of the writ of Habeas Corpus, or because he has an army, but because of the fearful anarchy of opinion which rages throughout the country. The natural consequence must be anarchy of action, since opinion is the parent of action, and military rule is better than anarchy,—is, indeed, the result of anarchy.

Everything is unsettled. No one can tell what are the wishes of the people, the purposes of parties or the probable course of opinion on any one subject connected with the situation of the country. One party clamors for the "Union as it was," the old Union with slavery, to bring back the arrogant dictation, the monstrous claims, the corrupt party alliances of the South, with the old quarrels and the old issues to cause another war. What do other parties desire? They scarcely know. They say, wisely, "Let us finish the war by utterly crushing the rebellion first and discuss questions relating to the Union afterwards."

But meanwhile the rebellion is not easily crushed, encouraged as it is by the sympathy of its Northern friends. It hails Democratic victories at the Northern elections with as much delight, as it does its own victories on the battle-fields of the Potomac. The former are evidences of a divided North, and it knows that a divided North cannot conquer a united South. The rebellion does not desire the "Union as it was," or any union with the North. But if it cannot obtain separation and independence, there would be some triumph in capturing Washington by force of votes, if it fails to do so by force of arms. Thus strengthened, however, it may be impossible either to conquer the Southern people or win them back by any concessions however humiliating. Should that be the result of the war, what is to be done? By what forms is separation to be accomplished? Which are the Southern States? Where is the line to be drawn, and who is to draw it? Can Congress draw it and erect a great Northern confederacy? "Impossible," is the cry, "the Constitution grants to Congress no such power. When the 'compact' is once broken, the Union ceases to exist, Congress ceases to exist, nothing remains of the nation once called the United States, and each State is at liberty to form what alliances it pleases. The Northwest will of course set up for itself; so will New England; the Middle States will be attracted in different ways, as interest, geography or slavery may direct; as for Pennsylvania, she will go with the South."

Such is the Babel of opinion resounding on all sides, wild, extravagant, insane, from which no definite plan or purpose can be gathered.

It seems, indeed, as if, for our presumption in attempting to raise our tower of empire so high, we had been struck with confusion of tongues, and had ceased to be intelligible to each other.

Is it not plain that to save us from anarchy and its consequences, military despotism, a Government is necessary, a real Government, not with limited powers, but with all powers adequate to the occasion? The Proclamation of the President is a military measure. As such it is Executive. But does it follow that over it Congress ought to have no control? Beyond its military effects, it may have consequences immediate and remote. It may influence slavery in the Border States; it may influence the condition of the rebellious States after they return to the Union, if they ever do. Congress represents the interests of all. Each party has a vote in Congress, has a hearing, has an appeal to the country. But, according to the wretched dogmas of the day, Congress has no power over the Proclamation because it is an Executive act, and no power over slavery because that lies within the interdicted province of the Slave States. An English Parliament would settle the matter very easily. It would adopt, modify or annul the Proclamation, as circumstances required. It would permit, restrict, alter or abolish slavery, according to the deliberate will of the nation. Should the settlement thus made prove unwise or unsatisfactory, another Parliament, instructed by experience and by a renewed expression of public opinion, would amend the work of the former, until, by this process, that justice was at last attained which satisfies all.

Parliament could do this because its authority is at the same time unshackled and unquestioned. No one doubts or disputes it, no one says its acts are void. Power of this sort is now demanded by our situation. There is something vital to the nation to be done,—something that must be done to save us from anarchy, to save the Union, or a Union, to preserve to us a Government and a country. But there is no one to do what is necessary, no man or body of men with authority to grasp the vast and complicated problem presented to us and solve it. This is the fatal calamity of the crisis. It is felt by every

one, and proposals are made to call a National Convention to arrange the dispute about slavery, and to do whatever the emergency may demand. What is this but a confession that we have no National Government? What is the object of a convention but to do something that Congress cannot do? So we had a Peace Convention two years ago, sitting in Washington alongside of Congress, attempting to do its work, but it could not prevent war. Congress, however, could have prevented war had it possessed absolute and unquestioned power over the whole subject. It might not have settled the question wisely or satisfactorily to all parties, but subsequent discussions about it would have been had in the halls of the Legislature, not in battle-fields.

And now it is proposed to choose, in the midst of civil war, by a popular election, a National Convention to do the work of a National Government. That Convention must be elected by the same people who have already elected a Congress. It will, therefore, represent the passions and opinions that divide the people and which are already represented in Congress. It will be governed by the same leaders of parties, the same "politicians," who already direct public sentiment and control public affairs, for none others can be elected because none others are known to the people. It will be wholly irresponsible, because its members, chosen for the occasion only, will not be influenced either by the hope of re-election or the fear of being turned out, and the people will thus have no means or opportunity of expressing their disapprobation of the conduct of the Convention. There will be no check whatever on its action, such as Congress is subjected to by its division into two houses, by the veto of the President, and by the opinion of the Judiciary. Invested thus with the omnipotence of an English Parliament, but without any of its restraining influences, internal or external, the Convention, dressed in a brief authority, might play some fantastic tricks, which, if they did not make the angels weep, would more than ever divide sections and parties, inflame passion and very probably produce the anarchy it was intended to prevent.

Conventions are ever prone to exceed their commission. The extent of power granted to them always becomes a question, which will always be decided according to the most enlarged and liberal construction. So it was with the Convention that made the Constitution. They were elected to alter and amend the Articles of the Confederation, and they abolished them altogether. The origin of that Convention was a meeting of commissioners, who assembled at Annapolis, instructed to inquire into the regulation of commerce. They said nothing about commerce, but adopted a report, exhorting the States to appoint a Convention to alter the Constitution.

In 1837, a Convention met to alter the Constitution of Pennsylvania. It was elected by virtue of an act of the Legislature, which declared that it should have authority "to submit amendments of the State Constitution to a vote of the people for their ratification or rejection, and *with no other or greater powers whatever.*" And yet, of this restricted body, a very influential and eminent gentleman, who has occupied some of the highest public stations, said, "What may it not do? It may reorganize our entire system of social existence, terminating and proscribing what is deemed injurious, and establishing what is preferred. It might restore the institution of slavery among us, it might make our penal code bloody as that of Draco; it might withdraw the charters of the cities; it might supersede a standing judiciary by a scheme of occasional arbitration and umpirage; it might prohibit particular professions and trades; it might permanently suspend the privilege of the writ of Habeas Corpus, and take from us the trial by jury."

Mr. Dallas was right. Such are necessarily the powers of an assembly, from which all restraint and responsibility are removed; and to the guardianship of such it is now proposed to commit the country and the Constitution, because unlimited power is necessary, and no existing authority has unlimited and unquestioned power. This power ought to be in Congress. I have endeavored to show in the course of this book, that according to the true construction of the Constitution, it is in Congress. There only can it be safely placed, because

there only can it be controlled. A Convention must, like Congress, be governed by a majority, and that majority, in the present state of opinion, is more likely to be extravagant, aggressive and tyrannical than a majority of Congress, whilst a minority would have no protection whatever, either from the President or from the people, for the people having given their whole power to the Convention, could not withdraw it, whereas the work of Congress is never done, and the people are always giving and withdrawing their power.

Should the performance of the Convention not satisfy the people, what is the remedy? Shall we call another? Which then would be the Government, Congress or these Conventions? A Convention, unless assembled by the forms provided in the Constitution, would be a body unknown to the law, and therefore without legal authority. If elected according to those forms, its acts must be ratified by the people. Thus there must be another resort to a popular vote, in the midst of war, with a wide field opened to agitators and demagogues to do their work of iniquity. What sane man could expect a fortunate or peaceful result from thus throwing our interests, our hopes and the Constitution into such a boiling sea of discord? How could the war prosper amid such agitations? Imagine a Convention now called in the South, to alter the Constitution of the Southern Confederacy. Would not such a measure be worth to us a dozen victories?

However elected, the Convention would be called to do something which Congress cannot do. At such a time, it would be, therefore, in the nature of a provisional or revolutionary government, but different from others of that kind in this, that the legal Government would be still in existence and full operation. It would seem a more simple way for that Government to do what is necessary, as it represents and is responsible to the people, and is in possession of all the apparatus of authority.

But it has not the constitutional power, is the answer. Whatever it might do beyond the strict limits of the law would be void, and could not command obedience. Thus we sit, spellbound within the invisible walls of an enchanted castle, unable to stir, hand or foot. If the nation

cannot be saved according to the Constitution, is the cry, let it perish. Yet what that Constitution is, or what its meaning, no one has the wit to find out. Something, however, must be done, and rather than permit Congress to do it, another Government, with unlimited and irresponsible power, is proposed, to whose charge is to be committed that Constitution, which cannot be trusted to the existing Government, restrained as it is by internal structure, and by the continuing control of the people.

It is a hazardous thing to alter a constitution, by setting aside and supplanting an existing Government in the midst of war. If the plan had been suggested by Mr. Jefferson Davis himself, it could not have been more ingeniously contrived to aid his designs. A divided North, raging parties, one of which opposes the war, popular agitation, possibly popular tumult and convulsion,—these at this time would be to him worth an army. Perhaps for this reason they might not be as agreeable to our army, as they certainly would be to his. A million of citizen soldiers in the field, might choose to have an opinion and a will on the exciting questions involved in such proceedings, especially when their manifest tendency is to strengthen and encourage the enemy. The army, if it moved in the matter at all, would either support the Convention or oppose it. If it opposed the Convention, the reign of anarchy would begin. If it supported the Convention, the reign of military power would begin. An army is only safe for the national liberty under a *legislature*, whose power is undisputed. A disputed authority, whose acts every one may call in question, is weak. Almost every act of our Government is declared unconstitutional and void by somebody. Therefore our Government is weak, if, indeed, we have any at all, which begins to be doubtful. Power by the laws of its nature leaves weakness and goes to strength. Power will leave a weak government that has a strong army, and go to the army.

War is the last resort of parties who have no common superior, acknowledged by both, to settle their disputes. The present war between North and South was caused by the want of such a superior. The want is still unsatisfied. No authority exists, recognized by all,

to decide the vital questions of the hour. The intelligence of the people has no organ, their will no arm. The Government sits imprisoned within the walls of the Constitution, ideal walls, which, strange to say, no one can describe, encircling power in a magic ring. Withdrawing from this mysterious precinct with superstitious awe, the people are trying to find some power, beyond the enchanted ground, some unlimited and undisputed power, to dispose of vexed questions by thought, instead of by force. It will be fortunate indeed, if they succeed, though everything is possible for the American people.

It cost England a Cromwell and thirteen years of military despotism, to get a free Parliament, that is to say, a Parliament free to do anything the people wished it to do. Cromwell was a great blessing to England. Such men do not grow on every bush, and he arrived at the lucky moment. The time may come, and ere long, when a Cromwell would be a great blessing to us.

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